



CITY OF EMERYVILLE

DATE: February 13, 2015

TO: Mayor and Members of the City Council

FROM: Michael G. Biddle, City Attorney

SUBJECT: AN URGENCY INTERIM ORDINANCE OF THE CITY COUNCIL OF THE CITY OF EMERYVILLE ESTABLISHING A MORATORIUM ON THE APPROVAL OR ISSUANCE OF A PLANNING PERMIT, PRELIMINARY DEVELOPMENT PLAN, FINAL DEVELOPMENT PLAN, SUBDIVISION, OR ANY OTHER DISCRETIONARY PERMIT FROM THE CITY OF EMERYVILLE NECESSARY FOR THE DEVELOPMENT OF MULTI UNIT RESIDENTIAL USES WITHIN THE CITY OF EMERYVILLE SUBJECT TO CERTAIN ENUMERATED EXCEPTIONS

STAFF RECOMMENDATION

Staff recommends the City Council consider this staff report and attached ordinance adopting as an urgency measure an interim ordinance establishing a moratorium on the approval or issuance of a planning permit, preliminary development plan, final development plan, subdivision, or any other discretionary permit from the City of Emeryville necessary for the development of multi-unit residential uses within the City of Emeryville subject to certain enumerated exceptions, and provide direction to staff. If the City Council wishes to adopt the interim ordinance as an urgency measure, the ordinance must be passed by a four-fifths vote. The measure will go into effect immediately, subject to the time limitations discussed below.

BACKGROUND

February 3, 2015 City Council Meeting

At its regular meeting on February 3, 2015, as part of an item listed on its posted agenda, the City Council held a discussion on development standards for new residential projects, particularly regarding unit mix, family-friendly design, affordability, and ownership. The City Council expressed an interest in adopting new regulations for future multifamily residential projects. In particular Councilmembers expressed a desire for regulations requiring a higher percentage of units with 3 or more bedrooms and family-friendly design. The City Council expressed a desire to review and reconsider the development bonus point structure in the current zoning regulations. Finally, the City

Council expressed interest in exploring methods to increase the number of affordable units offered, as well as ownership opportunities for new residential units.

As a result of the discussion, Councilmember Asher proposed the City Council adopt a moratorium on processing new planning approvals for residential multi-unit development projects while the Council and staff study the issues regarding unit mix, affordability, family-friendly design, housing tenure (i.e. rental vis-à-vis ownership), and the development bonus system. The City Council established a special meeting date of 5:00 p.m., Friday, February 13, 2015, to consider an urgency interim ordinance establishing a moratorium on the approval or issuance of planning approvals while the study is conducted. The proposed urgency interim ordinance is attached to this report.

DISCUSSION/ANALYSIS

Housing Element Goals, Policies, and Programs:

On October 13, 2009, the City Council adopted a new General Plan in conformance with state law for the City of Emeryville to serve as a guide for the continued transformation of the City of Emeryville.¹ The General Plan consists of seven required elements, including a Housing element. In accordance with state planning law, the City was required to undertake an update of its 2009-2014 Emeryville Housing Element. On November 18, 2014, the City Council approved Resolution No. 14-152 and thereby adopted the 2015-2023 Housing Element of the General Plan (the "Housing Element").² The Housing Element does not propose development of residential uses, but rather serves as a planning document that establishes goals, policies, and objectives relative to the provision of housing needs for all income levels and identifies sites where existing zoning allows residential development to accommodate the City's fair share of housing.

The Housing Element provides that the City will pursue seven distinct housing goals to address the identified needs, specifically including the following:

- H-2. Encourage the development of housing affordable to extremely low, very low, and low income households.
- H-6. Improve the balance in housing tenure and unit sizes to specifically address the need for family-friendly housing and increase owner occupancy

Housing Goal H-2 identifies two policies, implemented by various programs, to help achieve each goal, namely:

- Policy H-2-1. Ensure that the planning regulations continue to facilitate the development of affordable housing.

¹ <http://www.ci.emeryville.ca.us/385/General-Plan-and-Supporting-Documents>

² <http://www.ci.emeryville.ca.us/709/Housing-Element>

- Policy H-2-2. Support new housing opportunities for extremely low, very low, low, and moderate income households

Housing Goal H-6 identifies three policies, implemented by various programs, to help achieve each goal, namely:

- Policy H-6-1. Support the development of a variety of housing types for families, the provision of family-friendly amenities, and family friendly design in housing developments.
- Policy H-6-2. Promote homeownership opportunities and encourage the development of new for-sale residences.
- Policy H-6-3. Work with existing and potential Emeryville homeowners to prevent predatory lending and foreclosure

With respect to Policy H-6-1, the Housing Element identifies Program H-6-1-1 wherein by 2015 the City is to adopt and implement an amendment to the City's Design Guidelines that provides standards for the development of family friendly housing. The guidelines will address site design as well as unit design, including unit sizes and layouts, relationship of units to outdoor areas, and other unit and community features.

At its regular meeting of February 26, 2015, the City of Emeryville Planning Commission will be considering revisions to the City's Design Guidelines. The Guidelines provide standards for the development of family friendly housing, including site design and unit design, unit sizes and layouts, relationship of units to outdoor areas, other unit and community features, and percentage mix of unit types in multi-unit residential projects. Discussion and consideration of revisions to the Development Bonus System provided in the Planning Regulations (EMC 9-4.204) will be taken up at subsequent meetings of the Commission once City staff have had an opportunity to analyze them in light of Council direction.

At present the City is processing four (4) separate multi-unit residential use development applications proposing approximately 1,200 residential units combined, or roughly 80% of the City's Regional Housing Needs Allocation (RHNA) for the 2014-2022 projection period. Three (3) of the applications representing approximately 700 of the 1,200 residential units, or approximately 50% of the City's 2014-2022 RHNA, may be presented to the Planning Commission for consideration of approval of planning permits, preliminary development plans, final development plans and subdivisions prior to the adoption of the proposed revision to the City's Design Guidelines and Development Bonus System.

As discussed below, Government Code section 65858 allows the City to adopt as an urgency measure an interim ordinance prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the City is considering or studying. Approval of the four multi-unit residential use development projects discussed above without the guidance provided by the revisions to the City's

Design Guidelines and Development Bonus System will only serve to frustrate the City's ability to advance Housing Goals H-2 and H-6. Without the benefit of the planned additional study and analysis, approval of the four projects results in the development of more rental housing units, a large percentage of which is not conducive for families, and none of it is proposed to be available at rents affordable to extremely low, very low, low, or moderate income households, which is contrary to the goals, policies, and programs set forth in the Housing Element.

The proposed interim ordinance is necessary to avoid conflict with contemplated zoning amendments that the City Council, Planning Commission, and Planning staff is currently studying. The interim urgency ordinance is necessary to provide City staff and the Planning Commission sufficient time to present a comprehensive zoning proposal to the City Council to ensure that the development of additional multi-unit residential uses provides a sufficient number of housing units suitable for households with children to begin to address the current imbalance, that development bonuses are sufficiently targeted towards the provision of family-friendly affordable housing, and that sufficient incentives are explored to encourage development of ownership housing so as not to be detrimental to the public health, safety and welfare.

Proposed Interim Ordinance

The interim ordinance prohibits the approval or issuance of a planning permit, preliminary development plan, final development plan, subdivision³, or any other such discretionary permit required by the Planning Regulations to be approved by the City of Emeryville necessary for any Permittee to thereafter obtain a building permit to develop and construct a multi-unit residential use within the City of Emeryville.

The interim ordinance does not prohibit the issuance of a building permit for any multi-unit residential use which has secured all necessary planning permits, preliminary development plan, final development plan, subdivision, and/or any other required discretionary permit from the City as of the adoption date of the interim ordinance.⁴

Planned Unit Developments / Marketplace Project

The ordinance presented for City Council consideration encompasses any discretionary permits required by the Planning Regulations necessary for obtaining a building permit.

³ As those terms are defined in the Planning Regulations, Title 9 of the Emeryville Municipal Code.

⁴ The 3706 San Pablo Avenue project will not be affected by the interim ordinance, as that project has already received its planning approvals. Further, all 87 units will be affordable to low and very low income households, and the unit mix comprises 4 studio units (5%), 8 one bedroom units (9%), 45 two bedroom units (52%), 23 three bedroom units (26%), and 7 four bedroom units (8%). There are no other multi-unit residential use projects which have already received planning approvals. Likewise the 2 unit residential project at 5532 Doyle Street will be unaffected by the ordinance, since that project also received its planning approvals. Furthermore, because the ordinance only covers multi-unit projects, defined as three or more units, this 2-unit project does not fall within the scope of the ordinance.

Included in this scope are projects which require a preliminary development plan or a final development plan.

Article 10 of Chapter 9 of the Emeryville Municipal Code describes Planned Unit Developments (PUDs). PUD zones encourage creative development of large sites to permit flexibility in design, encourage large-scale site planning, and ensure that applicable provisions of the General Plan are established early in the development proposals.⁵

PUD applications are essentially a two-step process, as described in EMC 9-7.1003. An applicant first applies for and receives a Preliminary Development Plan (PDP) for the PUD. The PDP constitutes the zoning for the site and may stipulate that development of the PUD occur in phases. The PDP may stipulate the sequence and timing of the phases. Thereafter, the project proponent applies for approvals of one or more subsequent Final Development Plans (FDPs), corresponding to the phases approved in the PDP. In granting an FDP, the Planning Commission (or the City Council on appeal) must find that each FDP substantially conforms to the previously approved PDP.

TMG Partners, the former owner of the Marketplace, applied for a PUD/PDP for redevelopment of the site. The City Council approved the Marketplace Redevelopment Project Planned PUD/PDP on August 5, 2008. The project involved redevelopment of the existing Marketplace site with a phased development. On October 19, 2010, on a recommendation from the Planning Commission, the City Council approved the Final Development Plan (FDP) for Phase IA of the Marketplace PUD. This 190-unit rental residential building at the corner of Christie Avenue and 64th Street is currently under construction. Twenty-nine (29) of the units will be rented to very low income households; 8 of which are studio units, 13 one bedroom units, 7 two bedroom units and 1 three bedroom unit.

Subsequently AG-CCRP Public Market, LP (“AG-CCRP”) acquired the project site from TMG Partners. AG-CCRP has obtained the site with the PUD/PDP approvals in place and has been working toward obtaining FDPs for the remaining phases of the project.

As noted above the proposed interim ordinance prohibits issuance of any discretionary planning approval, including PDPs and FDPs. Therefore, even though AG-CCRP has obtained PUD/PDP approval for the overall Marketplace project, because the applicant must still obtain FDPs, the project is subject to the proposed ordinance. Staff seeks direction from the City Council on whether projects which have already obtained PUD/PDP approvals, but must still obtain one or more FDPs, should be subject to the ordinance.

⁵ EMC 9-7.1001

LEGAL CONSIDERATIONS

Statutory Framework for Adoption of Urgency Ordinances and Urgency Interim Ordinances

Urgency Ordinances

Most ordinances may only be adopted at a regular meeting of the legislative body and only after two readings.⁶ Adoption usually requires a majority vote of the total membership of the legislative body.⁷ An ordinance normally takes effect 30 days after final passage.⁸

However the City Council may adopt an urgency ordinance which takes effect immediately under specific circumstances. A city may adopt an urgency ordinance for the immediate preservation of the public peace, health or safety. The ordinance must contain a declaration of facts constituting the urgency, and the ordinance must be passed by a four-fifths vote of the city council.⁹ An urgency ordinance does not require two readings, but instead may be passed immediately upon introduction at either a regular or special meeting.¹⁰

Urgency Interim Ordinances and Required Findings

The Government Code allows a legislative body to adopt as an urgency measure an interim ordinance “prohibiting any uses that may be in conflict with a contemplated general plan, specific plan, or zoning proposal that the legislative body, planning commission or the planning department is considering or studying or intends to study within a reasonable time.”¹¹ The urgency interim ordinance requires a four-fifths vote of the legislative body for adoption and is effective for 45 days from the date of adoption.¹² The interim ordinance may be extended twice: initially for an additional 10 months and 15 days; and subsequently for one year. Any extension requires a four-fifths vote for adoption and no more than two extensions may be adopted.¹³

The Government Code provides that a legislative body shall not adopt or extend any interim ordinance unless the ordinances contain findings that there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional land use entitlements would result in that threat to public health, safety, or welfare.¹⁴

⁶ Government Code (GC) section 36934

⁷ GC 36936

⁸ GC 36937

⁹ Id.

¹⁰ GC 36934

¹¹ GC 65858(a)

¹² Id.

¹³ Id.

¹⁴ GC 65858(c)

In addition, an interim ordinance that denies approvals for projects with a significant component of multifamily housing may not be extended except upon written findings adopted by the legislative body, supported by substantial evidence on the record, that all of the following conditions exist:

- (1) The continued approval of the development of multifamily housing projects would have a specific, adverse impact upon the public health or safety. As used in this paragraph, a "specific, adverse impact" means 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 that the ordinance is adopted by the legislative body.
- (2) The interim ordinance is necessary to mitigate or avoid the specific, adverse impact identified pursuant to paragraph (1).
- (3) There is no feasible alternative to satisfactorily mitigate or avoid the specific, adverse impact identified pursuant to paragraph as well or better, with a less burdensome or restrictive effect, than the adoption of the proposed interim ordinance.¹⁵

Ten days prior to the expiration of the interim ordinance or any extension, the legislative body shall issue a written report describing the measures taken to alleviate the condition which led to the adoption of the ordinance.¹⁶

“Projects with a significant component of multifamily housing” means projects in which multifamily housing consists of at least one-third of the total square footage of the project.¹⁷

Findings for Adoption of Interim Ordinance

As a prerequisite for adopting or extending an interim ordinance, the Government Code requires the City Council to make findings that there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional land use entitlements would result in that threat to public health, safety, or welfare. The following findings are proposed in support of the interim ordinance:

1. The City Council of the City of Emeryville finds that the City of Emeryville has no regulations regarding the appropriate mix of size of units in multi-unit residential use developments. Further, application of the City’s Development Bonus System may have the unintended consequence of impairing the City’s ability to obtain development of affordable housing units, be it rental or ownership, in exchange for density bonuses granted to developers of multi-unit residential uses.

¹⁵ Id.

¹⁶ GC 65858(d)

¹⁷ GC 65858(h)

2. The City Council of the City of Emeryville finds that there is a significant interest in the establishment of multi-unit residential use developments within the City of Emeryville.

3. The City Council of the City of Emeryville finds that the establishment of multi-unit residential use development within the City of Emeryville, without regulations in place to prescribe the mix/ratio/percentage of units suitable for large households with children (i.e. 3+ bedrooms) and a Development Bonus System that definitively encourages and facilitates the production of affordable housing constitutes a current and immediate threat to the public health, safety and welfare of the citizens of Emeryville.

4. The City Council of the City of Emeryville finds that the approval of planning permits, preliminary development plans, final development plans, subdivisions or any other discretionary permit from the City of Emeryville for the development of multi-unit residential uses would result in that threat to public health, safety and welfare.

5. The City Council of the City of Emeryville finds that a temporary moratorium prohibiting the approval or issuance of a planning permit, preliminary development plan, final development plan, subdivision, or any other discretionary permit from the City of Emeryville required for the development of multi-unit residential uses, is necessary in order to allow the City sufficient time to develop, consider and adopt a comprehensive zoning proposal to ensure that the development of additional multi-unit residential uses provides a sufficient number of housing units suitable for households with children to begin to address the current imbalance, that development bonuses are sufficiently targeted towards the provision of affordable housing for households of all sizes, and that sufficient incentives are explored to encourage development of ownership housing. In so doing, the City will adopt regulations that will serve to avoid the resulting public health impacts to households with children from crowding and overcrowding, public health impacts to households who are forced to reside in crowded conditions, and the public health impacts to persons, primarily low wage service workers, from extended commutes between home and their place of employment in Emeryville.

The above findings establish a current and immediate threat to the public health, safety, and welfare, and approval of additional land use entitlements required for compliance with the City's Planning Regulations would result in a threat to public health, safety, and welfare.

Findings for Extension of Interim Ordinance

Because the contemplated moratorium has the effect of denying approvals needed for the development of projects with a significant component of multifamily housing, as noted above any extension also requires the City Council to make findings supported by substantial evidence that all the following conditions, repeated here, exist:

- (1) The continued approval of the development of multifamily housing projects would have a specific, adverse impact upon the public health or safety. As used in this paragraph, a "specific, adverse impact" means 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 that the ordinance is adopted by the legislative body.
- (2) The interim ordinance is necessary to mitigate or avoid the specific, adverse impact identified pursuant to paragraph (1).
- (3) There is no feasible alternative to satisfactorily mitigate or avoid the specific, adverse impact identified pursuant to paragraph as well or better, with a less burdensome or restrictive effect, than the adoption of the proposed interim ordinance.

Accordingly, with respect to an interim ordinance addressing uses with a significant component of multifamily housing, while the initial 45 day interim ordinance may be adopted based on findings of a current and immediate threat to "public health, safety, or welfare", the interim ordinance may only be extended beyond the 45 day period based on substantial evidence that the approval of the development of multifamily housing projects will have a specific, adverse impact on "public health or safety". Impacts on public welfare are immaterial. Further, there is the need to find that the ordinance is necessary to mitigate or avoid the specific, adverse impact and that there is no feasible alternative to mitigate or avoid the specific, adverse impact. These are very high evidentiary standards which the City will bear the burden of proof.

Finally, as discussed above, ten days prior to the expiration of the interim ordinance or any extension, the City Council is required to issue a written report describing the measures taken to alleviate the condition which led to the adoption of the ordinance. Therefore, if the City Council adopts the interim ordinance on February 13, 2015, the interim ordinance would expire on Monday, March 30, 2015, and thus the written report must be issued by Friday, March 20, 2015.

Moratoria in Other Jurisdictions

At the February 3, 2015 meeting, Councilmember Davis asked staff to research moratoria on development adopted by other cities and whether those ordinances faced legal challenges. A handful of California cities have adopted some form of interim ordinance. A summary is provided below:

- City of Monrovia (moratorium adopted in 2014): The city adopted an interim ordinance prohibiting the issuance of building permits for construction of new residential structures while the city reviewed adoption of new building and zoning regulations. The moratorium was adopted following the council's concern for maintaining the character of various neighborhoods and the perceived rapid development of residential units out of scale with the surroundings. In December

2014 the city extended the moratorium for an additional 10 months and 15 days. To date the moratorium has not been challenged.

- City of San Mateo (moratorium adopted in 2011): The city adopted a moratorium on the development of most residential rental units. The ordinance was adopted in response to the *Palmer* decision, which impacted the city's ability to require a percentage of residential rental units be affordable. The city made findings that the inability to impose affordability requirements on rental housing resulting in overcrowding in dwelling units. The City imposed the moratorium in order to consider amendments to its zoning ordinance. The moratorium was extended once for an additional 10 months and 15 days. It does not appear that the city's moratorium was challenged.
- City of Pasadena (moratorium adopted in 2004): The city adopted a moratorium prohibiting the issuance of building permits for certain residential projects in the city's central district. The city council expressed concern that new residential development was out of scale and character with the historic nature of the zoning district. A moratorium was necessary while the city finished its specific plan for the central district. The moratorium was not extended, nor was it challenged.
- City of West Hollywood (moratorium adopted 2007): The city adopted an interim ordinance temporarily prohibiting the issuance of permits or other approvals for development of new multifamily buildings in designated zoning districts. After the initial moratorium period of 45 days, the city sought to extend the interim ordinance for an additional 10 months and 15 days. A developer challenged the proposed extension, alleging the city failed to make the findings required for any extension of an interim ordinance, including the additional findings required when an interim ordinance affects development of multifamily housing (see further discussion on required findings below). The appellate court agreed with the developer and found the city failed to adequately make the necessary findings required by the statute.¹⁸ The *West Hollywood* case stands for the proposition that an interim ordinance and any extensions to the ordinance must be supported by the necessary findings prescribed in the statute.
- City of San Juan Capistrano (moratorium adopted in 1998): In order to slow the pace of residential development, the city adopted an interim ordinance suspending the processing of development applications on certain lots pending a comprehensive review and update of the general plan. The Building Industry Legal Defense Foundation, the litigation arm of the Building Industry Association of Southern California, challenged the ordinance.¹⁹ The question before the court was whether a city may adopt an interim ordinance prohibiting the

¹⁸ *Hoffman Street, LLC v. City of West Hollywood*, 179 Cal.App.4th 754 (2009)

¹⁹ *Building Industry Legal Defense Foundation v. Superior Court (City of San Juan Capistrano)*, 72 Cal.App.4th 1410 (1999)

processing of development applications. The court held that a city may, through the interim ordinance process, prohibit uses which may be in conflict with a general plan the city is studying, but the city may not prohibit the processing of development applications. Because the city's moratorium prohibited the processing of development applications, the court found the ordinance invalid. However it is important to note that while a city may not prohibit the processing of a development underlying application, the statute authorizing adoption of an interim ordinance explicitly allows the city to prohibit the temporary approval or issuance of planning approvals.

Staff notes that while the experience of moratoria in other cities is instructive, an interim ordinance adopted by the Emeryville City Council will be based on specific findings unique to Emeryville. Those findings arise from the particular facts and circumstances in Emeryville which have prompted the City Council to consider a moratorium on approval of planning approvals.

COMMENTS RECEIVED FROM THE PUBLIC

Staff has received correspondence from representatives of AG-CCRP Public Market, LP, owner of the Public Market; and Anton Development Company, LLC, developer of the "Nady Site" at 6701 Shellmound Street. The correspondence requests the City Council not adopt the proposed interim ordinance. Copies of the letters are attached.

CONCLUSION

In order to adopt the interim ordinance, the City Council must make the finding that there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional planning entitlements would result in a threat to the public health, safety, or welfare, as described in this staff report and contained in the ordinance. The interim ordinance will be valid for 45 days from adoption, after which it will expire unless extended as described above.

In addition the City Council is asked to provide direction on the following issues:

- Whether projects which have already obtained PUD/PDP approvals but must still obtain one or more FDPs should be subject to the ordinance.
- Whether the City Council wishes to exclude any other type of planning approval from the scope of the ordinance.
- Whether the City Council wishes to include additional or different findings in support of the interim ordinance

PREPARED BY: Michael G. Biddle, City Attorney
Michael A. Guina, Assistant City Attorney

**APPROVED AND FORWARDED TO THE
EMERYVILLE CITY COUNCIL**



Michael G. Biddle
City Attorney

Attachments:

1. Correspondence from representatives of AG-CCRP Public Market, LP, and Anton Development Company, LLC
2. Proposed Urgency Interim Ordinance