

August 25, 2020
SENT VIA E-MAIL

Navarre Oaks, Assistant Planner
City of Emeryville
1333 Park Avenue
Emeryville, CA 94608

Subject: UPDR18-002 (47th Street Homes, 1034 – 1040 47th Street) – Response to Planning Commission Action on June 25, 2020

Copy:

- Michael Guina, City Attorney
City of Emeryville
- Charles Higley, Esq.
Farella Braun + Martel LLP
235 Montgomery Street, 17th Floor
San Francisco, CA 94104
- Mark Forbes, Property Owner

Dear Navarre,

Thank you for your consideration of our application at 1034 – 1040 47th Street (UPDR18-002) to replace four existing single-family homes with three duplexes (six units). This letter responds to the comments and action relevant to this address by the Planning Commission at their June 25, 2020 hearing. At that meeting, the Commission recommended that the City Council deny the subject application.

This letter addresses the following three points:

1. The project's compliance with the Housing Accountability Act (Gov. Code § 65589.5), which requires the City of Emeryville to approve the project.
2. Our response to comments received from the Planning Commission and the public during the June 25th meeting. Comments addressed the project design, including tree preservation, architectural compatibility, parking, and affordability.
3. The project's compliance with the City's Residential Landlord and Tenant Relocation Ordinance.

HOUSING ACCOUNTABILITY ACT

This project is protected under the Housing Accountability Act (Gov. Code § 65589.5). It is a housing development project that consists of at least two-thirds residential uses and complies with the City's objective standards, as documented in the June 25, 2020 staff report to the Planning Commission.

The California legislature adopted the Act with the express purpose of encouraging housing production by limiting the circumstances under which a city or county may deny approval of an otherwise code-complying project. Under the Act, the City is only permitted to reject a project

that meets the City's objective standards if there is a preponderance of evidence that the project would have a significant, unavoidable, and quantifiable impact on "objective, identified written public health or safety standards, policies, or conditions." Gov. Code §65589.5(j). In addition, the Housing Accountability Act prohibits the city from reducing requested density or imposing any conditions that have the same effect or impact on the ability of the project to provide housing. Gov. Code § 65589.5(i) and (j). There is no evidence, let alone a preponderance of evidence, that the project would have any impact on public health and safety that cannot be feasibly mitigated, as required by the statute.

Where a project protected by the Housing Accountability Act is nonetheless rejected, a broad range of plaintiffs can sue to enforce the Act and obtain injunctive relief compelling a city's compliance with the Act. The City would bear the burden of proof in any challenge. Gov. Code § 65589.5(k). The Act makes attorney's fees and costs of suit presumptively available to prevailing plaintiffs, requires a minimum fine of \$10,000 per housing unit for jurisdictions that fail to comply with the Act within 60 days, and authorizes fines to be multiplied by five times if a court concludes that a local jurisdiction acted in bad faith when rejecting a housing development. *Id.*

The Housing Accountability Act overrides any other housing entitlement findings the City of Emeryville may have relevant to its own land use policies and laws. The Act sets forth the criteria on which the City must make a determination about the project and against which a court would evaluate the City's determination; under State law, the City's demolition findings, or findings of non-detriment, cannot be used to deny the project.

RESPONSE TO COMMENTS DURING JUNE 25, 2020 PLANNING COMMISSION MEETING

The Planning Commission provided a number of comments during the June 25th meeting, as summarized in the left-hand column of the table below. Responses from the applicant are provided in the right-hand column.

<i>Planning Commission Comments</i>	<i>Applicant Response</i>
Affordable Housing. Commissioners were generally concerned about the loss of existing units that provide affordable housing	The project site does not currently support any affordable housing that is protected by deed restriction, covenant, or controlled rent factors. It is not affordable housing as defined by law. The project proposes to demolish 4 out of 14 existing units. Notably, based on current income levels published by the State Department of Housing and Community Development (HCD), <u>all ten units to remain provide market rents at below-market rates</u> : 9 units are currently rented at Very-Low Income household AMI and 1 unit is currently rented at Low Income household AMI. Rents average \$1,325 in the units to remain. The property owner has no intention of altering these 10 units or their occupancies.

<i>Planning Commission Comments</i>	<i>Applicant Response</i>
	<p>Moreover, based on current market rate rents in Emeryville, the proposed units could be rented for approximately \$3,200 - \$3,500. These rent levels represent rents affordable to Moderate Income AMI households, according to HCD. As a result, the proposed project would add two housing units to the City's housing stock and provide "missing middle" housing. These medium-sized duplex units share walls, play areas, and garages, and therefore are more affordable—by their design—than new single-family homes. They represent the type of transitional density and development expressed by the General Plan and Zoning Ordinance for this neighborhood.</p>
<p>Parking. Some Commissioners were concerned about the location of parking behind the proposed duplexes, while others supported the removal of three curb cuts.</p>	<p>The project proposed to locate the garages in the rear to be consistent with the City's adopted policies. It is possible that the garages could be located at the front of the site instead of the rear. However, this would retain three of the four existing curb-cuts, reduce the number of on-street parking spaces available, and eliminate front yard open space and some of the street furniture proposed, including street trees and short-term bicycle racks. Moreover, this site plan change would locate garages on the primary façade, which is inconsistent with General Plan Policy UD-P-15 and UD-P-19, which seeks to "To avoid a continuous row of garages along the street...provide a minimum of 70% active non-parking related uses" and "provide activation at the lot frontage and minimize visible off-street parking."</p>
<p>Trees. Commissioners were generally concerned about the removal of three mature trees; a silver maple and two poplars</p>	<p>Our team acknowledges that these three trees represent a difficult community and project trade off. They are mature and lend character to the immediate neighborhood. However, the City of Emeryville does not have standards for the retention of such trees or adopted requirements for tree replacements. As stated in the project arborist report, all three trees are in fair health. The silver maple has an embedded chain and "included" bark that may weaken its structure, as illustrated in the photo below, taken from the project arborist report. The City's consulting arborist's report recommends changing the health ratings from fair to good or excellent for all three trees. However, the report indicates that the City's arborist only observed the trees from the sidewalk, a distance of more than 60 feet from the trees. Additionally, the report acknowledges that they were observed in spring and could not be fully assessed since at least one tree was in the process of leafing out.</p>

Planning Commission Comments	Applicant Response
	<div data-bbox="553 325 868 747" data-label="Image"> </div> <div data-bbox="552 747 748 770" data-label="Caption"> <p>Included Bark at Tree #42</p> </div> <div data-bbox="904 325 1195 747" data-label="Image"> </div> <div data-bbox="902 747 976 770" data-label="Caption"> <p>Tree #42</p> </div> <div data-bbox="553 800 993 1117" data-label="Image"> </div> <div data-bbox="552 1115 774 1138" data-label="Caption"> <p>Embedded Chain at Tree #42</p> </div> <p>Setting aside the health of the trees, it is possible to retain the trees if the parking configuration were changed. The City Council recently approved changes to the Zoning Ordinance that eliminate minimum parking requirements for the type of project proposed herein. The project and site plans could be revised to eliminate the driveway and garages in two of the three duplexes. This would reduce the number of parking spaces proposed from seven to three. Alternatively, if two additional curb cuts were made, parking could be kept at seven but that would require almost the entire front yards of two of the duplexes to be dedicated to driveways instead of open space. Public parking at the curb would also be reduced. Our team has not proposed making these changes to the project design because we believe the neighborhood friendly design of the fronts of the units, without the garages, is more appropriate for the community. Both cannot be accommodated. However, a reduction in parking is unlikely to be supported by neighbors who expressed concern during the June 25, 2020 Planning Commission hearing about the plan's proposal to provide one parking space per unit (plus, one guest space and additional on-street parking).</p>

<i>Planning Commission Comments</i>	<i>Applicant Response</i>
Architectural Design. Some Commissioners were concerned about the architectural design of the project in relation to the character of the neighborhood	The three duplexes are designed to fit within the existing neighborhood scale of the surrounding properties. Front porches and balconies create a bungalow aesthetic and contribute to the single-family and moderate-density multi-family character on 47th Street. The ground floor façade would be alternated patterns of stained wood siding and smooth white stucco. A gable roof caps each structure and follows the roof style and pitch found elsewhere along 47th Street and within the surrounding neighborhood. The project is not required to meet the City's Family Friendly Design Guidelines since it does not exceed 10 units; however, the project has been designed to meet all of the relevant Family Friendly Design Guidelines.
City Findings/HAA Compliance. Some Commissioners did not believe the City's findings could be made since the project represented a materially detrimental impact; at least one Commissioner acknowledged that the project was consistent with the Housing Accountability Act and therefore could not be denied based on the City's findings	Compliance with the City's findings has been well-documented in the Applicant Statement and affirmed in the June 25, 2020 staff report and resolution to the Planning Commission. The "general" and "sense" of findings that were forwarded by the Planning Commission lack any statements of fact to support them either with respect to the City's own findings, or with respect to the Housing Accountability Act. These findings cannot be made. However, as detailed in the discussion on the Housing Accountability Act, the Council decision on this project falls under the statutory requirements of State law and not the City's own findings.

RESIDENTIAL LANDLORD AND TENANT RELATIONS ORDINANCE

The subject project proposes demolition of four units. One of these units is occupied; the other three units are vacant. The landlord, Mark Forbes, is working with Mimi Fils-Aime (the remaining tenant) to ensure that her housing needs are met and that she is appropriately compensated, consistent with the City's Residential Landlord and Tenant Relations Ordinance (EMC Chapter 5.40). Ms. Fils-Aime has been represented by a tenant attorney who is (as of this writing) preparing an agreement between Mr. Forbes and Ms. Fils-Aime that is intended to provide Ms. Fils-Aime with the protections to which she would be entitled in the event of an eviction, including relocation expenses (in the amount of \$15,210, as required by EMC Chapter 5.40) and the right to return to one of the new units in the completed project at the rent she is

currently paying. This relocation expenses are based on current fair market rents published by HUD for a 3-bedroom unit and the requirements of the ordinance, which require multiplying that value by five. Ms. Fils-Aime has provided Mr. Forbes with a letter stating her intent to move out by September 19, 2020. Prior to her representation by counsel, conversations between the Ms. Fils-Aime and Mr. Forbes have been supervised by City of Emeryville Housing Division staff and the City's third party mediator, ECHO Housing. This mediation was intended to ensure transparency and compliance with the spirit of the Residential Landlord and Tenant Relations Ordinance.

We look forward to presenting the project to the City Council for consideration on September 15th.

Sincerely,

A handwritten signature in black ink, appearing to read 'Mark Rhoades', with a horizontal line drawn underneath it.

Mark Rhoades, AICP

Rhoades Planning Group

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