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Emeryville City Council
City of Emeryville Town Hall
1333 Park Avenue
Emeryville, CA 94608

Re: 1034-1040 47th Street (UPDR18-002) – Response to City Council Statements at September 15, 2020 Hearing

Dear Members of the City Council:

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 some of the issued raised by the Emeryville City Council at the September 15, 2020 hearing on the application.

After debate on the application, the City Council continued the hearing to permit City staff to determine the date when the application was deemed complete.[1] Prior to the hearing, staff had not proposed any Housing Accountability Act findings to disapprove the project and the City Council did not attempt to make any findings under the Act before continuing the hearing. The hearing is scheduled to resume tomorrow, October 6, 2020.

In light of the City Council's inaction on the project, this letter addresses three points:

1. The project's compliance with the Housing Accountability Act (Gov. Code § 65589.5).
2. Recent legislative measures to strengthen the Housing Accountability Act and impose heightened penalties on noncompliant cities.
3. The Permit Streamlining Act, which, when invoked, requires the City Council to act on an application by a date certain, otherwise the application will be deemed approved by operation of law.

The Project Complies with the Housing Accountability Act

As explained in the letter from Rhoades Planning Group, dated August 25, 2020, this project is protected under the Housing Accountability Act. It is a housing development project that consists

[1] Staff has now determined the application was complete as of December 18, 2019.

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.
Accordingly, the City may only reject the project 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). The Act also prohibits the City from imposing any conditions that have the same effect on the project's ability to provide housing. Gov. Code § 65589.5(i) and (j). Neither staff nor the City Council has shown that the project would have any adverse impact on public health and safety that cannot be feasibly mitigated.

It bears emphasis that the City's burden to show an adverse impact on public health or safety is a stringent one. The Act states: "It is the intent of the Legislature that the conditions that would have a specific, adverse impact upon the public health and safety . . . arise infrequently." Gov. Code § 65589.5(a)(2)(L)(3). A State Assembly committee report on a 2018 bill amending the Act, AB 3194, explained that the amendment intends "to establish a very high threshold for a local agency to justify denying or conditioning a housing project for health or safety reasons."[2] For this reason, an official in another California city has stated that the Act "makes it extremely difficult to deny a housing development project for subjective reasons such as neighborhood compatibility or aesthetics and design," and that the Legislature's intent in reducing local discretion was "unmistakable."[3]

A California court interpreting identical language in a different statute—also requiring a finding of "significant, quantifiable, direct, and unavoidable impact" on public health or safety for disapproval—characterized the standard as difficult to meet. *Hoffman St., LLC v. City of W. Hollywood*, 179 Cal. App. 4th 754, 771 (2009). The language in fact requires two findings: (1) a significant impact on public health or safety; and (2) objective, written standards against which to measure that impact. *Id.* In the *Hoffman St.* case, where the City made a general finding that the need for affordable housing was a threat to the public health or safety, the Court concluded the finding was inadequate because the City "failed to identify any specific impact on public health or safety" from the project in question *and* failed to identify any objective standard on which to base the impact. *Id.* at 772.

Here, the City Council has not articulated a finding of adverse impact or even a standard against which to measure a purported impact. Stated concerns about the loss of affordable housing units are, as in *Hoffman St.*, without factual basis. The project site does not currently support any affordable housing that is protected by deed restriction, covenant, or controlled rent factors. It is

[2] April 25, 2018, Assembly Committee on Housing and Community Development, Analysis of AB 3194, available at: https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB3194.
[3] March 7, 2019, Memorandum from David Jimenez, City of Monrovia Director of Community Planning and Development, to City of Monrovia Planning Commission, available at: https://www.cityofmonrovia.org/home/showdocument?id=19999.

not affordable housing as defined by law. Should the City Council deny the project, the owner may still renovate the existing units and rent them out for top dollar, but the City would have denied itself additional housing units to address the acute housing shortage that is the whole point of the Housing Accountability Act. The City has cited no evidence, let alone a preponderance of evidence in the record, to show a negative, quantifiable impact on affordable housing or any public health or safety standard. Rather, by adding new housing stock for Emeryville the project would fulfill the Act's purpose to "significantly increase the approval and construction of new housing for all economic segments of California's communities." Gov. Code § 65589.5(a).

If one accepts the City Council's position that the existing housing cannot be demolished under the Act, the City Council could prevent demolition of *any* existing market-rate housing in Emeryville on its own subjective grounds. That is clearly contrary to the language and purpose of the "high threshold" for Housing Accountability Act adverse impact findings, and would render a nullity the Legislature's instruction that a City can make sufficient findings only "infrequently." Gov. Code § 65589.5(a)(2)(L)(3).

Nor can the City rely on subjective reasons like a purported loss of "character" to disapprove the project. The Legislature pinpointed "unjustified local resistance" to new housing "because it often is perceived as bringing negative changes to a community's quality or character" as a prime reason for 2017 amendments to strengthen the Act, as discussed in the next section.[4]

Because the project complies with the City's objective standards and the City cannot make findings of a significant, quantifiable adverse impact on public health or safety, the Housing Accountability Act requires the City to approve the project.

The Legislature Has Bolstered Enforcement of the Housing Accountability Act

In addition to AB 3194, the Legislature passed and the Governor signed three other bills in 2017 and 2018 to strengthen the Housing Accountability Act—SB 167, AB 678, and AB 1515.

After these amendments, the Act now requires the City to support its findings of a significant, adverse impact by a preponderance of the evidence, rather than merely substantial evidence. Gov. Code § 65589.5(j). As explained in floor analysis on the amendment, "[t]he purpose of this provision is to impose a higher standard on local governments that wish to deny or impose certain conditions on housing projects that qualify for the protections of the HAA."[5]

The amendments have also strengthened the Act's enforcement provisions in subsection (k) should a jurisdiction disapprove a project and the applicant sue:

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[4] September 15, 2017, Assembly Floor Analysis, AB 678, available at: https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201720180AB678.
[5] *Id.*

- Courts may order injunctive relief, including requiring the City to approve or disapprove a project application within 60 days.
- If the City fails to comply within 60 days, the Act requires a minimum fine of $10,000 per unit, and the court may also order the City to approve the project.
- If the applicant prevails in court, the City must pay the applicant's attorney's fees and costs, except in extraordinary circumstances.

In cases where a court finds the City acted in bad faith, the penalties are even more stringent. The court can order the City to approve the project immediately. Gov. Code § 65589.5(k). In addition, the court must multiply fines by a factor of five if the City in bad faith fails to comply with the court's order to act within 60 days. Gov. Code § 65589.5(l).

At the hearing, one councilmember raised the prospect that the City could simply pay its way out of compliance with the Housing Accountability Act, asking "What are the likely costs going forward if we say no?" and stating that maybe the City could "afford" the cost of litigation. However, as the above provisions make clear, where a City disapproves a project in violation of the Act, the City will bear its own legal costs and that of the applicant, and the court will order injunctive relief anyway.

Further, the staff report for the September 15, 2020, hearing included no proposed findings to disapprove the project. Should the City now attempt to manufacture Housing Accountability Act findings to disapprove the project without holding a new hearing, the City's post-hoc attempts to justify a predisposition to disapprove the project may appear in bad faith, especially in light of the above comments at the September 15, 2020, hearing.

The Permit Streamlining Act Requires the City to Act Promptly

Finally, the City has also missed its deadline under the Permit Streamlining Act ("PSA") to act on the project. Even though the application was deemed complete last year, in December 2019, the City has still not approved or disapproved the project.

Under the PSA, the City has sixty (60) days from the date that it determines a housing development project is exempt from CEQA in which to approve or deny the project. Gov. Code § 65950(a)(5). After 60 days pass from that deadline for approval, the PSA permits the applicant to invoke the PSA and provide public notice of the City's need to act on the application. Gov. Code § 65956(b). Once the applicant invokes the PSA, the City has only 60 days to approve or deny the project—otherwise the project is deemed approved by operation of law. Gov. Code § 65956(b).

Here, the project was deemed complete on December 18, 2019. The CEQA Guidelines require the agency to "determine within 30 days after accepting an application as complete

whether it intends to prepare an EIR or a Negative Declaration." Cal. Code Regs. tit. 14, § 15102. Therefore, the City's deadline to make a CEQA determination on the project was January 17, 2020. Arguably, the City's failure to do so by January 17, 2020 started the 60-day clock for the City to approve or deny the project. That deadline expired March 17, 2020, meaning we are well within our rights to invoke the PSA.

Regardless, the latest date the City could be found to have determined that the project is exempt from CEQA was June 25, 2020, when City staff so stated in a report to the Planning Commission. Based on that date, the City's deadline to approve or disapprove the project was August 24, 2020 and we may invoke the PSA on October 23, 2020. Accordingly, we intend to invoke the PSA should the City again fail to act on the project at the October 6, 2020 council meeting. If we invoke the PSA, the project will be deemed approved if the City then fails to act within the next 60 days.

For all of the above reasons, the City should approve the application to add two units to Emeryville's housing stock.

Very truly yours,

Charles J. Higley

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