CF 19-0342 / PLUM Agenda Item 5: Communication from Applicant [JMBM-LA.75596.0003]

Brower, Neill <nb4@jmbm.com> Mon, Apr 15, 2019 at 1:50 PM
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Rita and Patrice:

Please find attached our letter, on behalf of applicant Etco Homes, regarding Item 5 on tomorrow's PLUM agenda.

Thank you,

---Neill

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LTR to PLUM re 714 Sweetzer Appeal 20190412.pdf
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Ref: 75596-0003

April 15, 2019

BY EMAIL

Hon. Chair Marqueece Harris-Dawson
Members of the Planning and Land Use
Management Committee
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Attn: Rita Moreno, Legis. Asst.
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Re: Council File No. 19-0342
714-718 Sweetzer
VTT-74129-CN
DIR-2018-2720-WDI
ENV-2018-2721-CE
Hearing Date: April 16, 2019
Agenda Item 5

Dear Chair Harris-Dawson and Members of the PLUM Committee:

Our office represents Etco Homes ("Etco"), owner and applicant for the above-referenced vesting tentative tract map (the "Map") and waiver of dedication and improvement of a public alley (the "Waiver"), which apply to the already approved building that is currently under construction. We respond to the appeal, which essentially repeats several arguments already considered and rejected by the Central Area Planning Commission ("APC") and previously considered and rejected over two years ago by the City Planning Commission ("CPC") and the Director of Planning in cases DIR-2014-4762-DB-1A and ENV-2014-4763-CE. Both cases—which addressed the building under construction—are final and years beyond challenge, building permits were validly issued pursuant to those approvals, and Etco has the absolute right to complete construction. Other points the appeal raises simply are not legally or factually accurate. Overall, nothing presented in the appeal provides any basis to overturn the APC's action, which sustained the Deputy Advisory Agency ("DAA") and Director approval of the Map and Waiver. Because the appellant bears the burden to overcome the approvals, and has failed to meet his burden, the PLUM Committee should deny the appeal and affirm the prior actions.

Fundamentally, the appeal asks the Council to act in a manner that seriously threatens development of relatively lower-cost housing throughout the City. Denying a mere condominium

map for a zoning-compliant development already subject to multiple levels of approval and environmental review destabilizes developers and needlessly increases uncertainty and cost where such problems need not exist. This is completely antithetical to the Mayor's mission of increasing rental and sale housing to serve a variety of households.

Further, it serves no purpose. Etco has already provided substantial relocation assistance, exceeding the requirements of the City Housing and Community Investment Department, and ***every tenant has found housing of a higher quality than existed at the Property***. The Map and Waiver approval have no relationship to any (false) claim otherwise.

1. The Project Complies with the General Plan.

As determined by the prior planning case over two years ago, the development is located on an infill site that provides no habitat or other biological value and meets all City land use regulations and exemption criteria.[1] Also, as described further below, the appeal mischaracterizes claimed social effects as physical environmental impacts.

(a) The Project Complies with the Objective Standards of the Zoning and General Plan Designations, and State Law Forbids a Different Finding.

As a preliminary matter, State law specifically prohibits a finding that a density bonus conflicts with land use regulations:

> "(1) The granting of a concession or incentive ***shall not*** require or be interpreted, in and of itself, to require a general plan amendment, local coastal plan amendment, zoning change, study, or other discretionary approval. "

Further:

> "(2) Except as provided in subdivisions (d) and (e), the granting of a density bonus ***shall not*** require or be interpreted to require the waiver of a local ordinance or provisions of a local ordinance unrelated to development standards."

(Govt. Code §65915(j); emphasis provided.) Section 12.22-A.25(g)(2)(c) of the Municipal Code includes similar language. Thus, under the law, the ***previously approved and final density bonus and incentives*** do not violate local plans or regulations, and therefore could not require any relief beyond the underlying entitlements required in the absence of a density bonus. In any case, the appeal provides no evidence of any kind—let alone substantial evidence—of any significant

[1] We note that because the appeal's arguments on this point were previously offered and rejected for the prior approvals, a contrary finding is precluded here.

environmental effect, nor of any effect the City did not previously consider when it approved the building.

(b) The Project is Otherwise Consistent with the General Plan.

A general finding of consistency with the Community Plan or General Plan does not require strict consistency with every policy or with all aspects of a plan. Land use plans attempt to balance a wide range of competing interests, and a project need only be consistent with a plan overall; even though a project may deviate from some particular provisions of a plan, the City may still find the project consistent with that plan on an overall basis. (*Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 815 (2007).)

Here, the appeal attempts to cherry-pick certain policies from the Community Plan and Framework Element, and wrongly to claim that the loss of the existing units conflicts. In fact, the Project is consistent with the very policies upon which the appeal relies. Moreover, the appeal mischaracterizes rent-stabilized units as affordable units, when ***no affordable units existed on the Property***. For example:

> "Objective 3. To make provision for the housing required to satisfy the varying needs and desires of all economic segments of the Community, maximizing the opportunity for individual choice."

Here, the Project would provide a mix of market-rate condominium units of different sizes, as well as affordable rental units. Collectively, these would provide additional and more affordable work-force ownership opportunities than traditional single-family homes, and would provide rental units affordable to very-low-income households. Affordable rental units—particularly at these affordability levels—were not previously available on the Property.

Policies from the General Plan Framework Element, cited by the appeal, include the following:

> "Goal 1: A City where housing production and preservation result in adequate supply of ownership and rental housing that is safe, healthy, and affordable to people of all income levels, races, ages, and suited for their various needs.
>
> "Objective 1.2: Preserve quality rental and ownership housing for households of all income levels and special needs.

Here again, the Project would provide a different kind of housing that would serve different household types and needs, including relatively more affordable workforce housing, in comparison to traditional single-family houses. The households served would include those that require access to very-low-income rental housing units, as the Project includes those. Further, Objective 1.3, also cited by the appeal, encourages the City to plan for changing housing needs over time, and the Project would not conflict with any such plan, as it provides a different kind of housing to meet a different need than was previously met.

The appeal also cites to Policies 1.2.2 and 1.2.8, which relate to preserving and providing affordable housing, including near transit. However, as stated above, the units on the Property were rent-stabilized, not affordable, and subject to rent increases to market. No units classified as affordable existed on the Property, though the Project would provide two such units. The appeal simply provides no basis for a determination that the Deputy Advisory Agency abused its discretion—it merely disagrees with the result, and therefore fails to carry its burden.

2. The Project Complies with Zoning.

As with the appeal's allegations regarding General Plan consistency, the allegations regarding a conflict with zoning are simply erroneous, and to the extent they rely on the Density Bonus, they are unlawful. Further, the appeal relies on the absence of a single word that the determination does not even need to include, as described below. The appeal bizarrely claims the waiver of alley dedication somehow violates the Municipal Code, even ***though the appeal cites one of the Municipal Code's express provision for such waivers***. Significantly, the appeal neglects the parallel provisions in Article 7 of the Municipal Code.

3. The Project Complied Fully with City Procedures, and the Bureau of Engineering Concurred in the Waiver of the Alley Dedication, Contrary to the Appeal.

The appeal wrongly states the Deputy Advisory Agency did not follow the required procedures for the waiver of alley dedication, and implies the development used an "early start" program or sought to obtain permits without environmental review. Simply put, the City followed the required procedures, and the appeal simply ignores the express statements by Planning staff at the APC hearing on the appeal regarding both issues.

As stated by Planning staff at the appeal hearing before the APC, the Bureau of Engineering ("BOE") expressly concurred in declining to require dedication of the portion of the alley adjacent to the Property. Contrary to the appeal, the word "waiver" need not appear in the Letter of Determination. Rather, as Planning staff also specifically stated at the APC hearing, the Division of Land provisions in the Municipal Code expressly authorize the DAA to "include or omit, in whole or in part, the reports or recommendations of the other concerned officials or City departments," provided the recommendations are considered at a public hearing. (§ 17.03-A.)

Consistent with these Municipal Code provisions, the DAA hearing specifically addressed the need for dedication and improvement both along Sweetzer Avenue and the alley to the south of the Property. Regarding these dedications and improvements, the appeal erroneously claims certain conditions were purposely struck and others imposed "on the fly" and without consultation with the Bureau of Engineering. In fact, Planning staff incorrectly struck condition S.3.(i)i, regarding Sweetzer Avenue improvements and dedication. As discussed extensively at the hearing—which the appellant attended—Etco requested the reestablishment of that condition, ***in accordance with the BOE recommendations***. Regarding condition S.3.(i).ii (alley dedication

and improvement), Etco Homes requested the waiver as part of its map application, and not as a density bonus incentive because, as stated in the application and at the hearing, the requested alley would fail to provide the access for which it was intended. As described at the DAA and APC hearings, the developments beyond the Property have already reached the full density permitted by zoning and have not provided the additional 2.5 feet of dedication and improvements; consequently, any dedication of additional alley width would occur only along the Property, and would effectively dead-end. ***Senior staff of the BOE agreed with Etco's assessment and request and—exactly contrary to the claim in the appeal—agreed to decline to require that dedication and improvement***. Again, all of this discussion occurred at the DAA hearing, which the appellant attended, and was further clarified at the APC hearing, which appellant also attended. That appellant simply disagrees with the outcome is not a basis for any finding of error or abuse of discretion, or for sustaining the appeal.

4. The Project Would Not Have a Significant Environmental Effect, as The City Previously Determined in 2016.

The appeal attempts to mischaracterize speculative social effects as physical environmental impacts, in violation of the California Environmental Quality Act ("CEQA," Pub. Res. Code §21000 *et seq.*) and mischaracterizes the environmental determination. In fact, the City previously considered—more than two years ago—the environmental effects of the building that the Map and Waiver concern, when the City approved the building and determined the development was categorically exempt from further review under CEQA.[2] That determination was upheld on appeal and is now final and beyond legal challenge. The appellant simply neglects the prior approvals and their associated findings. Further, as the approved Map and Waiver would not result in any physical environmental effects, the current Exemption remains proper and the appellant provides no evidence otherwise.

Further, The Housing Accountability Act ("HAA") prohibits a City from disapproving a housing development project that complies with the objective standards of the General Plan and zoning regulations unless it finds, based on a preponderance of the evidence, the project would have an unavoidable impact on public health or safety that cannot be feasibly mitigated in any way other than rejecting the project or reducing its size. [§ 65589.5(k).] The State Legislature has declared that the kinds of impacts justifying those actions "will occur ***infrequently***." (*Id.*, § 65915.5(a)(3); emphasis added.)

Here, as described above, the appeal fails to articulate any basis for a finding of conflict with objective development criteria provided in the General Plan, and fails to provide any evidence of any significant and unavoidable impact to public health, safety, or welfare. The only impact asserted by the appeal relates to the claimed loss of rent-stabilized apartments. However, contrary to the appeal, the loss of rent-stabilized units does not result in a loss of affordable units,

[2] Case no. DIR-2014-4762-DB, issued September 15, 2016.

which were never present on the Property. In fact, the approved building will ***provide*** new affordable units. However, even if appellant's claim were true (it is not), ***the demolition of rent-stabilized units and replacement with new units is a socio-economic issue to which CEQA simply does not apply***. (CEQA Guidelines §§15064(f), 15131.) Further, any required analysis associated with the loss of the units already occurred in 2016.

(a) The Development and Exemption Were First Approved in 2016.

The original Project approval addressed the demolition of then-existing units and the building currently under construction. In accordance with sections 15300.2 and 15332 of the State CEQA Guidelines, the City determined the Project fell squarely within the qualifying criteria of the Class 32/Infill Development Project categorical exemption (the "Exemption"). Pages 8-11 of the 2016 Director's determination specifically address each of the required criteria for the Exemption, even though no such findings were required.[3] Consistent with these findings, the Director adopted the Exemption as part of the original Project approvals.

(b) The City Planning Commission Affirmed that the Development, in Combination with Another Project, was Exempt.

The Director's approval was subsequently appealed to the City Planning Commission ("CPC"),[4] which also determined the Exemption applied. The CPC adopted, with modifications, the Director's findings consistent with that determination. The modifications reflected the CPC's simultaneous ***evaluation of the effects of two projects on Sweetzer***, even though the CPC specifically acknowledged the projects were not related[5]: That is, the analysis also addressed and included findings for the project at 724-728 N. Sweetzer, in addition to 714-718 N. Sweetzer, determining the two developments together would not have a significant environmental effect and were categorically exempt from further review. The CPC's decision, including the decision on the Exemption, was not further appealed and became final. Because no legal action ever challenged the Exemption, the Exemption itself is beyond challenge.

(c) Etco Already Has the Absolute Legal Right to Complete the Building, Which is Already Well Under Construction, and the Approved Map and Waiver Would Have No Physical Effects.

The current case only concerns a condominium map and waiver of dedication for the previously approved building, which remains under construction. As stated in the public hearing before the

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[3] *See, e.g., Respect Life South San Francisco v. City of South San Francisco*, 15 Cal.App.5th 449 (2017) (Adoption of a categorical exemption includes an implied finding that no unusual circumstances apply to the subject project).
[4] Case no. DIR-2014-4762-DB-1A.
[5] *Id.* at p. F-6.

DAA and Director, the Map and Waiver do not propose and would not cause any physical change beyond those already evaluated in the 2016 approvals. Because they would have no physical effect, and because the prior approvals also were exempt, the Exemption remains proper here.

Etco's right to complete the approved building, based on its validly issued building permits, is vested by law and therefore absolute. The concept of vesting limits the power of a local government entity to impose more restrictive regulations on the developer of a site after a certain point in the permitting process, usually after some actual development of the site has occurred in reliance on a validly issued building permit. *Avco Community Developers, Inc. v. South Coast Regional Comm'n*, 17 Cal. 3d 785, 791, 793 (1976), cert. denied, 429 U.S. 1083 (1977) ("*Avco*"). When a permit becomes vested, it may be revoked only if the permittee fails to comply with the terms or conditions in the permit or if there is a "compelling public necessity." *Goat Hill Tavern v. City of Costa Mesa*, 6 Cal. App. 4th 1519, 1530 (1992). Generally, courts limit compelling public necessity to abatement of a use that has become a public nuisance. *Id.* at 1524.

Here, Etco began demolition of the then-existing building and construction of the approved building, according to the prior approvals and validly issued building permits, in 2017. No evidence indicates or could indicate that issuance of the permits for the building was somehow invalid. "Vertical" construction of the building has already occurred: that is, the foundation of the building is complete, and construction of the building itself has commenced, with substantial expenditures by Etco on that construction. Further, no evidence presented the appellant or anyone else has even purported to suggest the building poses a threat to public health or safety, and all administrative and legal challenges to the 2016 approvals to construct the building are years beyond their applicable statutes of limitations. Consequently, under California law, and as provided by the California Supreme Court, Etco has a vested right to finish constructing the building, absent a nuisance determination, which does not exist here. *See Davidson v. County of San Diego*, 49 Cal. App. 4th 639, 648 (1996).

The Map itself only facilitates the sale of the individual units as condominiums. It proposes no physical changes to the building, as the prior approvals contemplated the higher parking requirements for condominiums (in comparison to apartments). Indeed, the approved Map depicts the building as "under construction"[6] Similarly, the Waiver would perpetuate the existing condition of the Property with respect to the alley along the south property line: the original approval did not contemplate additional dedication or improvement of the alley. Neither approval modifies the approved building in any way or otherwise alters the current or proposed physical condition of the Property; rather, the Map and Waiver only constitute the subsequent administrative approvals required for sale, rather than rental, of the units in the approved

[6] *See* Exhibit "A" to the determination letter for VTT-74129-CN (the approved Map).

building, and formalize the lack of need to improve the paper alley, which would result in an isolated dead-end.

(d) No Unusual Circumstances or Cumulative Impacts Could Apply, as the City Previously Determined and Because No Physical Changes Would Occur.

When an agency determines a categorical exemption applies, ***the appellant bears the burden*** of demonstrating an unusual circumstance will result in a significant environmental effect, and must provide substantial evidence support that assertion. *Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal.4th 1086, 1105 (2015), citing *Davidon Homes v. City of San Jose*, 54 Cal.App.4th 106, 115 (1997). Here the appellant has provided no evidence, and the effects claimed are not physical impacts within the meaning of CEQA. Consequently, the appellant has failed to meet his burden, and no basis exists for overturning the exemption.

The development is a typical infill project, as described by the current and previous environmental findings. It is completely surrounded by urban development and meets the criteria listed in section 15332 of the CEQA Guidelines. The City previously determined, the development, in combination with other nearby development, would not result a significant physical effect, and no unusual circumstances apply to the Map or Waiver.

Further, to the extent the appeal claims mitigation measures are insufficient to address the claimed impacts, it ignores that no mitigation measures are required, as the Map and Waiver propose no physical changes to the environment. Therefore, no circumstance exists or could exist that would change their prior determination and result in a physical effect. Crucially, the "unusual circumstances" exception refers to conditions that would result in significant ***physical impacts*** to the environment. (CEQA Guidelines §15300.2(c); *Berkeley Hillside Preservation v. City of Berkeley*, 60 Cal.4th 1086, 1105 (2015).) The demolition of rent-stabilized (not affordable) units already occurred in 2017, in compliance with the 2016 City Planning approvals for the Property, and the Map and Waiver would not change that. The replacement of older dwelling units with new, for-sale and rental dwelling units is a regular, typical occurrence.

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5. Appellant Has Failed Even to Attempt to Satisfy His Burden of Proof, and the PLUM Committee Should Affirm the Director's Approval of the Map and Waiver.

For all of the reasons described above, the appeal is wrong on the law and facts, and it provides no evidence to support any of its claims. Because the appellant bears the burden of proof to overcome the approvals—now affirmed on appeal—and because the actual approvals at issue bear no relationship at all to the majority of the appellant's claims, no evidentiary basis exists to overturn the approval of the Map and Waiver. Therefore, we respectfully request the PLUM reject the appeal and affirm the determinations of the DAA and APC, which facilitate a development that provides affordable housing and has already been subject to substantial review by the City.

Sincerely,

NEILL E. BROWER of
Jeffer Mangels Butler & Mitchell LLP

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cc: (via email)
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