

Holland & Knight

50 California Street, Suite 2800 | San Francisco, CA 94111 | T 415.743.6900 | F 415.743.6910
Holland & Knight LLP | www.hklaw.com

Jennifer L. Hernandez
+1 415-743-6927
Jennifer.Hernandez@hklaw.com

November 8, 2018

VIA EMAIL AND FEDERAL EXPRESS

Madolyn Agrimonti
Mayor
City of Sonoma
No. 1 The Plaza
Sonoma, CA 95476

Madolyn.Agrimonti@sonomacity.org

Re: Potential Exposure to Litigation regarding Application for a Use Permit, Tentative Map, and Related Approvals Authorizing the Sonoma Gateway Project.

Dear Mayor Agrimonti:

We represent Broadway and MacArthur LLC (“Applicant”) on land use matters related to its application for a Use Permit, Tentative Map, and related approvals authorizing a mixed-use development featuring 33 residences and one 3,500 square-foot commercial space (the “Project”) proposed for a 1.86-acre site located at 870 Broadway in the City of Sonoma (“City”). As you know, the Project was approved by the Planning Commission on May 10, 2018, which action was subsequently appealed to the City Council. The Project was initially before the Council at its August 6, 2018 meeting. But the item was continued to the Council’s September 17, 2018 meeting, and then continued to the Council’s October 1, 2018 meeting, at which the Council voted 3-2 to deny the appeal and approve the Project. Resolutions and findings documenting the Council’s October 1 action were included as a consent item on the agenda for the Council’s November 5, 2018 meeting. We are disappointed that the City Council did not approve such resolutions and findings at its November 5, 2018 meeting, voting instead to continue the item, yet again, to the Council meeting scheduled for December 3, 2018.

We expect that a majority of the Council will vote to approve the resolutions and findings at its December 3, 2018 meeting, given this worthy Project’s considerable merits and commitment to providing much needed housing in the City. However, we feel compelled to take this opportunity to ensure that you and the City Council are fully aware of the Housing Accountability Act, Cal.

November 8, 2018

Page 2

Gov. Code § 65589.5 (“HAA” or the “Act”), its applicability to the Project, and the City’s significant exposure to litigation that would occur if the Council were to reject or further delay the Project or take any action to reduce its density.

The HAA prohibits the City Council from rejecting the Project or reducing its density. Taking either of these actions would expose the City to significant legal liability.

Nearly thirty years ago, the California Legislature found and declared that a lack of housing “is a critical problem that threatens the economic, environmental, and social quality of life in California,” and that “[t]he excessive cost of the state’s housing supply is partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing.” Gov. Code § 65589.5(a). To combat this trend, the Legislature enacted the HAA in 1982.

Under the HAA, “[w]hen a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the housing development project’s application is determined to be complete,” a local agency cannot disapprove a project or reduce its density, unless it finds that the project would have an unavoidable impact on public health or safety. Gov. Code § 65589.5(j). The HAA defines a density reduction to include “any conditions that have the same effect or impact on the ability of the project to provide housing.” Gov. Code § 65589.5(j)(4).

At its May 10, 2018 hearing on the Project, the Planning Commission expressly determined that the Project complies with all General Plan, zoning, and subdivision standards that were in effect at the time the Project application was determined to be complete. The Staff Report and its proposed findings of fact prepared by the City’s Planning Department for the Council’s November 5 meeting further re-affirm that the Project complies with all General Plan, zoning and subdivision standards. Under the HAA, the question of a project’s compliance with objective standards is resolved under a standard of review that is highly favorable to the applicant: “a housing development project . . . shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would *allow a reasonable person to conclude* that the housing development project . . . is consistent, compliant, or in conformity.” Gov. Code § 65589.5 (f)(4) (emphasis added). The Project easily satisfies this highly deferential standard, since both the Planning Commission in its May 10, 2018 resolution, and the City’s expert planning staff in its recent staff reports, both affirmed that the Project complies with all such standards.

Since the Project complies with the City’s objective General Plan, zoning and subdivision standards, the HAA “imposes a substantial limitation on the government’s discretion to deny a permit.” *N. Pacifica, LLC v. City of Pacifica* 234 F. Supp. 2d 1053, 1059 (N.D. Cal. 2002), *aff’d* sub nom. *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478 (9th Cir. 2008) (internal quotation omitted). The City may not reject the Project or reduce its density based on any subjective or discretionary criteria, such as “suitability” or “compatibility.” *Honchariw v. Cty. of Stanislaus*, 200 Cal. App. 4th 1066, 1076 & 1079 (2011). The only grounds on which this General Plan and zoning-compliant project could be legally rejected are extremely narrow, and again must be based

on standards that were in effect when the Project application was deemed complete. Before the City could legally reject the Project or reduce its density, the City would be required to demonstrate, based on a preponderance of the evidence, that the project would cause “a significant, quantifiable, direct, and unavoidable impact” on public health or safety, “based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.” Gov. Code § 65589.5(j)(1)(A). The City would be required to further affirmatively prove that there are no feasible means of addressing such “public health” and “safety” impacts other than rejecting or reducing the size of the Project. Gov. Code § 65589.5(j)(1)(B).

The City has not made any findings that the Project would have any negative effects at all on public health or safety - to say nothing of a “significant,” “unavoidable” impact. On the record before the City Council, no such findings could be credibly made. Indeed, the Initial Study and proposed Mitigated Negative Declaration affirmatively demonstrate that there would be no unavoidable impacts of any kind, and even the comments by project opponents do not purport to identify any unavoidable “public health” or “safety” impacts that are based on “objective, identified written public health or safety standards, policies, or conditions.” Gov. Code § 65589.5(j)(1)(A). Moreover, staff has proposed findings demonstrating that the Project qualifies for the Class 32 CEQA exemption for infill projects. Therefore, the HAA does not authorize the City to reject the Project or reduce its density. *See Honchariw*, 200 Cal. App. 4th at 1081. For similar reasons, the California Environmental Quality Act also does not authorize the City to reduce the density of the Project. *Sequoyah Hills Homeowners Ass’n v. City of Oakland*, 23 Cal. App. 4th 704, 714-16 (1993).

If the City violates the HAA, a very broad range of plaintiffs can sue to enforce the Act. The applicant can bring an action to challenge the government’s decision, but even if the developer declines to sue, any “person who would be eligible to apply for residency” can also bring an action to enforce the act. Gov. Code § 65589.5(k)(1). In addition, any “housing organization” – defined as any “trade or industry group whose local members are primarily engaged in the construction or management of housing units or a nonprofit organization whose mission includes providing or advocating for increased access to housing for low-income households and have filed written or oral comments with the local agency prior to action on the housing development project” – can challenge an improper project disapproval. Gov. Code § 65589.5(k)(1)(A), (k)(2).

The “Legislature’s intent in enacting [the HAA] ... in 1982 and in expanding its provisions since then was 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 and emergency shelters.” Gov. Code § 65589.5(a)(2)(K). In the most recent legislative session, the California Legislature recognized that “[t]hat intent has not been fulfilled,” *id.*, and took action to significantly strengthen the requirements of the HAA. Ch. 368, Stats. 2017; Ch. 373, Stats. 2017; Ch. 378, Stats. 2017.

In any litigation, it would be City, not the challenger, who would bear the burden of proof, and the recent reforms to the Act heighten the City’s burden, and significantly increase the City’s monetary

November 8, 2018

Page 4

liability for violating the act. Under the revised Act effective January 1, 2018, any local government that disapproves a housing development project or reduces its density must now meet the more demanding “preponderance of the evidence” standard – rather than the more deferential “substantial evidence” standard – in proving that it had a permissible basis under the Act to reject the project. Gov. Code § 65589.5 (j)(1). Moreover, the benefit of the doubt is resolved in favor of the applicant, because the Legislature has instructed courts to resolve all doubts in favor of promoting, rather than obstructing, the production of housing. *See* Gov. Code § 65589.5(a)(2)(L) (“It is the policy of the state that. . . [the HAA] should be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing”).

The reformed Act also makes **attorney’s fees presumptively available to prevailing plaintiffs**. Gov. Code § 65589.5(k)(1)(A). Under the revised Act, if the City fails to prove that it had a valid basis to reject the project, the court must issue an order compelling compliance with the Act, and any local government that fails to comply with such order within 60 days *must* be fined a **minimum of \$10,000 per housing unit** and may also be ordered directly to approve the project. Gov. Code § 65589.5(k). If a local jurisdiction acts in bad faith when rejecting a housing development, the applicable fines must be **multiplied by five**. *Id.* **For this 33-unit project, the applicable fines would be between \$300,000-\$1.5 million, all before considering the City’s obligation to pay the attorney’s fees of any plaintiff forced to bring suit to enforce the HAA.**

Recently, several jurisdictions have been found liable for violating the HAA in comparable circumstances, and were forced to pay the prevailing attorneys’ fees. *See, e.g., S.F. Bay Area Renters Federation v. Berkeley City Council*, No. RG16834448 (Alameda Cty. Sup. Ct. July 21, 2017); *S.F. Bay Area Renters Federation v. City of Sausalito*, No. CIV1704052 (Marin Cty. Sup. Ct. Apr. 20, 2018). As we stated previously, we hope and expect that the Council will vote to approve the Project regardless of the Act’s requirements. However, in the event the Council does not promptly take action to approve this Project, we have been authorized by the Applicant to pursue all available remedies under the law to enforce the requirements of California law.

Sincerely yours,

HOLLAND & KNIGHT LLP



Jennifer L. Hernandez

JLH:mlm

CC: Cathy Capriola, City Manager
Jeffrey Walter, City Attorney
Veronica Nebb, City Attorney