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YIMBY LAW

10/26/2021

San Francisco Board of Supervisors
1 Dr. Carlton B. Goodlett Place - City Hall, Room 244
San Francisco, CA 94102

Board.of.Supervisors@sfgov.org
Via Email

Re: 469 Stevenson St.
2017-014833CUA

Dear San Francisco Board of Supervisors,

YIMBY Law is a 501(c)3 non-profit corporation, whose mission is to increase the accessibility and affordability of housing in California. YIMBY Law sues municipalities when they fail to comply with state housing laws, including the Housing Accountability Act (HAA). As you know, the Board of Supervisors has an obligation to abide by all relevant state housing laws when evaluating the above captioned proposal, including the HAA. Should the City fail to follow the law, YIMBY Law will not hesitate to file suit to ensure that the law is enforced.

The Project involves the construction of a new 27-story, 274-foot-tall residential building containing 495 dwelling units. The Project Sponsor seeks to utilize the State Density Bonus Law, Government Code Section 65915 et seq ("the State Law"), as amended under Assembly Bill No. 2345 (AB-2345). Under the State Law, a housing development that includes affordable housing is entitled to additional density, concessions and incentives, and waivers from development standards that might otherwise preclude the construction of the project. Because the Project Sponsor is providing 13% of base project units of housing affordable to very-low income households, the Project seeks a density bonus of 42.5% and invokes an incentive/concession from Height (Section 250), and waivers of the following development standards: 1) Maximum Floor Area Ratio (Section 123); 2) Rear Yard (Section 134); 3) Common Useable Open Space (Section 135); 4) Dwelling Unit Exposure (Section 140); 5) Ground-Level Wind Current (Section 148); and 6) Bulk (Section 270).

The project was entitled by the Planning Commission at their July 29, 2021 meeting. When approving the project, the Planning Commission found "that the Project is, on balance, consistent with the Objectives and Policies of the General Plan."

California Government Code § 65589.5, the Housing Accountability Act, prohibits localities from denying housing development projects that are compliant with the locality's zoning ordinance or general plan at the time the application was deemed complete, unless the locality can make findings that the proposed housing development would be a threat to public health and safety.

With the approved Density Bonus incentives and waivers, the above captioned Project is zoning compliant and general plan compliant, therefore, your local agency must approve the application, as the Planning Commission has already done once, or else make findings to the effect that the proposed project would have an adverse impact on public health and safety, as described above.

The City determined that this project would require an Environmental Impact Report. On March 11, 2020, the Planning Department published the Draft Environmental Impact Report ("DEIR") and provided public notice in a newspaper of general circulation of the availability of the DEIR for public review and comment and of the date and time of the Planning Commission ("Commission") public hearing on the DEIR. On March 11, 2020. The Final Environmental Impact Report (FEIR) document was published on May 26, 2021 and includes copies of all of the comments received on the DEIR and written responses to each comment. The Commission reviewed and considered the FEIR for the Project and found the FEIR to be adequate, accurate, and objective, thus reflecting the independent analysis and judgment of the Department and the Commission, and that the summary of comments and responses contained no significant revisions to the Draft EIR, and approved the FEIR for the Project in compliance with CEQA, the CEQA Guidelines, and Chapter 31.

On July 29, 2021, the Commission conducted a duly noticed public hearing at a regularly scheduled meeting on Application Nos. 2017-014833DNX, 2017-014833CUA, and 2017-014833ENV to consider the various approvals for the Project, including Downtown Project Authorization, Conditional Use Authorization, and CEQA Findings. The Commission found, "the proposed project will not be detrimental to the health, safety, convenience, or general welfare of persons residing or working in the vicinity. There are no features of the project that could be detrimental to the health, safety, or convenience of those residing or working the area." The Commission also found that "the Project is consistent with and would promote the general and specific purposes of the Code provided under Section 101.1(b) in that, as designed, the Project would contribute to the character and stability of the neighborhood and would constitute a beneficial development...The Commission hereby finds that approval of the Conditional Use Authorization would promote the health, safety, and welfare of the City."

CEQA Analysis Must Balance Housing with Environmental Concerns

In addition to your obligation to approve this project based on it meeting the requirements of the HAA, the Board also has an obligation to make every effort to make decisions related to EIRs in support of increasing housing.

The state's approach to CEQA is one of balance; the state's interest is in both protecting the environment and "providing a decent home and satisfying living environment for every Californian." *Public Resource Code § 21000(g); 21001(d)*

It is important to note that CEQA does not give the City any new powers independent of the powers granted by other laws, and CEQA is specifically subject to limitations provided in other laws. § 21004; § 15040(a). *County of San Diego v. Grossmont-Cuyamaca Community College District, 141 Cal.App.4th 86, 102 (2006)* found that "an agency's authority to impose mitigation measures must be based on legal authority ***other than*** **CEQA**." In fact, the exercise of a city's powers under a law like the HAA must be within the scope of the city's authority provided by that law and needs

to be consistent with the limitations set by that law. See § 15040(d) and (e).

The HAA Requires Projects to Comply With CEQA, However the HAA is Mainly Concerned with the Environmental Consequences of Project Disapprovals

Certainly, housing developments that are approved by lead agencies are required to comply with CEQA, but it's important to note that in its references to CEQA, the HAA is silent about the environmental consequences of *approving* housing developments. CEQA's statutory and regulatory mandate applies only to project approvals. However, the HAA is principally concerned with the environmental consequences of a lack of housing, and of disapproval of a particular housing project. Examples of supporting language in the HAA include,

> "The lack of housing, including emergency shelters, is a critical problem that threatens the economic, environmental, and social quality of life in California." § 65589.5(a)(1)(A)
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> "Many local governments do not give adequate attention to the economic, environmental, and social costs of decisions that result in disapproval of housing development projects, reduction in density of housing projects, and excessive standards for housing development projects." § 65589.5(a)(1)(D)
>
> "California has a housing supply and affordability crisis of historic proportions. The consequences of failing to effectively and aggressively confront this crisis are hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state's environmental and climate objectives." § 65589.5(a)(2)(A)
>
> "An additional consequence of the state's cumulative housing shortage is a significant increase in greenhouse gas emissions caused by the displacement and redirection of populations to states with greater housing opportunities, particularly working- and middle-class households. California's cumulative housing shortfall therefore has not only national but international environmental consequences." § 65589.5(a)(2)(I)
>
> "**It is the policy of the state that a local government not reject or make infeasible housing development projects, including emergency shelters, that contribute to meeting the need determined pursuant to this article without a thorough analysis of the economic, social, and environmental effects of the action** and without complying with subdivision (d)." § 65589.5(b)

The legislature recognizes that the statewide housing shortage, and local agencies' disapprovals of housing projects have a substantial negative impact on the environment. While CEQA is focused on the environmental effects of of project approvals, **the HAA policy framework clearly requires any local agency that denies approval of a housing project, or makes a housing project infeasible, to thoroughly analyze the environmental consequences of said denial or disapproval, even if the agency has valid HAA findings for disapproving a project. Denial of the Project would be a CEQA violation under HAA, and thus the denial itself is an action that needs its own initial study.**

The Conditions for a Project to be Lawfully Disapproved are Established by the HAA

The HAA determines the conditions under which a project that includes very low-, low-, or moderate-income households, can be lawfully disapproved in *§ 65589.5(d);* (also reference *North Pacifica, LLC v. City of Pacifica, supra, 234 F.Supp.2d at 1059-60).* There are five prescribed circumstances under which a project can be disapproved; and then any findings must be written, and based on a preponderance of evidence.

The City cannot disapprove a housing development project or place conditions upon approval if doing so would make the project infeasible unless it finds, based upon a record of a preponderance of evidence, that the proposed project, "would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households..." § 65589(d)(2). The HAA also clarifies that "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 the application was deemed complete." Therefore, in order to lawfully disapprove the Project, the City would need to have a written document that existed on the date the application was deemed complete that contains objective, identified public health or safety standards, policies, or conditions.

If the City is able to to prove by a preponderance of the evidence that it does have written, objective, identified public health or safety standard, policy, or conditions, then the City would need to prove, by a preponderance of the evidence, that the Project would have a "significant, quantifiable, direct, and unavoidable" impact in order to lawfully disapprove the Project. **If the City cannot prove, based on a preponderance of evidence, that the Project would impact all four qualities: significant, quantifiable, direct, and unavoidable; using a document that itself is qualified under the meaning of the HAA, then it cannot legally deny approval of the Project.** *Hoffman Street, LLC v. City of West Hollywood*, *179 Cal.App.4th 754, 771-72 (2009)* held that the city did not make the findings necessary to adopt an ordinance for failing to identify "a specific, adverse impact upon the public health or safety" and to identify any "written public health or safety standards, policies, or conditions."

CEQA Does Not Allow the City to Disapprove this Project

CEQA requires a specific process for cities to follow when planning an activity that could fall within its scope. § 15002(k):

1) Determination of whether or not an activity is a "project," that "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." § 21065.

2) If the activity is determined to be a project, the City needs to determine if the project is exempt from the CEQA review, via either a statutory or categorical exemption process (§ 21080, §21084(a), § 15260-15285, § 15300-15333). If the project is not exempt, the City then must evaluate if the project imposes a significant environmental impact. If there's no such impact, then the City "must 'adopt a negative declaration to that effect.' " § 21080(c); § 15070.

3) If the City determines a project "may have a significant effect on the environment," it must go through the EIR process before approving the project. § 21100(a); §21151(a); §21080(d); §21082.2(d).

It's important to note that CEQA does not require disapproval of a project that the City finds having a significant environmental impact, nor is the City required to select the alternative "most protective of the environmental status quo" option. *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco, 102 Cal.App.4th 656, 695 (2002)* found if "economic, social, or other conditions" make alternatives and mitigation "infeasible," a project is allowed to be approved regardless of its significant environmental impacts as long as the City approves a "statement of overriding considerations" that determines that the project's benefits exceed the potential environmental impact. § 21002, §21002.1(c), § 5093. When the city determines whether or not a mitigation measure is feasible, it "involves a balancing of various 'economic, environmental, social, and technological factors.'" § 21061.1. *The CEQA Guidelines* define "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." § 15364.

The HAA determines the basis for the city to possibly deny a housing project under § 65589.5(d) and § 65589.5(j); neither subsection references CEQA or the environment. §65589.5(e), requires CEQA compliance, but that does not "relieve the local agency from making one or more of the findings required pursuant to Section 21081" if there is a proposed project with significant environmental effects. The HAA is what sets the only conditions where the City is permitted to disapprove a project or condition a project to make it infeasible *(see North Pacifica, LLC v. City of Pacifica, supra, 234 F.Supp.2d at 1059-60).*

The city has no feasible way to fail to approve the Project even if it is eventually found to have significant and unavoidable environmental effects under CEQA (see *Sequoyah Hills Homeowners Association v. City of Oakland, 23 Cal.App.4th 704 (1993)).* In the Sequoyah Hills case, NIMBYs sued over Oakland's EIR certification and the approval of a 45-unit housing development project that was covered by the HAA. The City of Oakland found that the HAA prevented it from requiring the developer to reduce the project's density, which was the remedy requested by the NIMBYs. The Oakland City Council decided that it would be legally infeasible to decrease the project's density under the HAA.

The NIMBYs lost their suit, appealed, and the Court of Appeal affirmed the trial court's denial of the NIMBY's attempt to affect the project, agreeing with Oakland and the developer that the HAA "is not a legislative will-o'-the-wisp. On the contrary, the legislature found that 'The lack of affordable housing is a critical problem which threatens the economic, environmental, and social quality of life in California.'" The Court held: "the only way appellant can avoid the impact of section 65589.5, subdivision (j)(1), is by establishing that the project, at the approved density, will have a "specific, adverse impact upon the public health or safety." This they cannot do. There is no evidence to support such a conclusion, and the city specifically found that no such impact would result from the project. We conclude that the city did not abuse its discretion when it found that any decreased density alternative would be legally infeasible and approved the mitigated alternative."

Conclusion

It is clear that the City and County of San Francisco is required to approve the Project at 469 Stevenson Street, which you will effectively do by denying the CEQA Appeal. The City has not identified any health and safety impacts that cannot be mitigated with approval of this project, and even if it does identify significant environmental impacts in the future, the city will be obligated to evaluate the environmental consequences of *not* approving the Project if the City fails to issue a statement of overriding considerations or approve a mitigated alternative that allows the development to proceed. It's also abundantly clear how the Project's benefits to the community exceed any environmental impacts of this infill development, which have not yet even been established.

I am signing this letter both in my capacity as the Executive Director of YIMBY Law, and as a resident of California who is affected by the shortage of housing in our state.

Sincerely,



Sonja Trauss
Executive Director
YIMBY Law