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YIMBY LAW

11/2/2021

Burbank City Council
275 East Olive Avenue
Burbank, CA 91502

citycouncil@burbankca.gov
Via Email

Re: SB-35 Ministerial Approval Process / Agenda Item K-5

Dear Burbank City Council,

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 City Council has an obligation to abide by all relevant state housing laws when making policy decisions. Should the City fail to follow the law, YIMBY Law will not hesitate to file suit to ensure that the law is enforced.

YIMBY Law submits this letter to inform you of your city's obligations under California law, pertaining to the ministerial approval process for SB-35 development applications. This letter is intended to help educate the Council during your meeting to enact an ordinance designating yourselves as the ministerial approval body for SB-35 applications.

As amended by SB-35 (Wiener, 2017), the California Government Code § **65913.4(c)** reads as follows:

> (c) Any design review or public oversight of the development may be conducted by the local government's planning commission or any equivalent board or commission responsible for review and approval of development projects, or the City Council or board of supervisors, as appropriate. **That design review or public oversight shall be objective and be strictly focused on assessing compliance with criteria required for streamlined projects, as well as any reasonable objective design standards published and adopted by ordinance or resolution by a local jurisdiction before submission of a development application, and shall be broadly applicable to development within the jurisdiction**. That design review or public oversight shall be completed as follows and **shall not in any way inhibit, chill, or preclude the ministerial approval provided by this section or its effect**, as applicable[...]

As defined by §102(n) of the *Updated Streamlined Ministerial Approval Process Guidelines,* published on March 30, 2021 by the California Department of Housing and Community Development (HCD), which are regulatory mandates which "have the dignity of statutes"[Ramirez v. Yosemite Water Co., 20 Cal. 4th 785, 800 (1999)],

> "Ministerial processing" or "ministerial approval" means a process for development approval involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project. The public official merely ensures that the proposed development meets all the "objective zoning standards," "objective subdivision standards," and "objective design review standards" in effect at the time that the application is submitted to the local government, but uses no special discretion or judgment in reaching a decision.

While the legislature permits a city to designate their City Council as a ministerial approval body for SB-35 streamlined applications, doing so brings grave risk of allowing improper, illegal actions by the Council. We encourage you to set aside the question of whether the law allows the City Council to act as an impartial, ministerial approval body, and instead evaluate whether the Council is in a position to be one.

The Burbank City Council, which, by its very nature, is an elected political body where every decision made carries political risk, and is formed expressly to apply special discretion and judgment in making decisions. To expect elected officials, whose actions carry personal political consequences and who have strong, outspoken positions on many subjective zoning, design review, and other community standards, to set aside all of their biases, political platforms, and fear of voter retribution, so that they can make ministerial, objective, decisions involving no personal judgment or special discretion, asks the impossible.

The city already has an established ministerial approval process for project applications: those applications are submitted to the Community Development Director, and if necessary, appealed to the Planning Board. The experience and expertise of those bodies, who routinely review project applications for objective standards under a ministerial approval requirement, and are not subject to intense political pressures, should not be replaced by an inexperienced, politically biased, elected City Council. The Council is not trained or experienced in evaluating projects according to their objective standard criteria, and is incapable of making decisions without personal judgment as to the wisdom of carrying out the project. Indeed, the Council is elected specifically to pass personal judgment on all manner of city affairs, including the wisdom of carrying out a project.

Should the city foolishly attempt to allow the City Council to act as the ministerial approval body for SB-35 streamlined project applications, we call your attention to §300(c) of HCD's *Updated Streamlined Ministerial Approval Process Guidelines:*

> Determination of Consistency
>
> (1) When determining consistency with objective zoning, subdivision, or design review standards, the local government shall only use those standards that meet the definition referenced in Section 102(q). For example, design review standards that require subjective decision-making, such as consistency with "neighborhood character," shall not be applied as an objective standard unless "neighborhood character" is defined in such a manner that is non-discretionary.
>
> (2) A standard that requires a general plan amendment, the adoption of a specific plan, planned development zoning, or another discretionary permit or approval does not constitute an objective standard. A locality shall not require a development proponent to meet any standard for which the locality typically exercises subjective discretion, on a case-by-case basis.

(3) Modifications to objective standards granted as part of a density bonus, concession, incentive, parking reduction, or waiver of development standards pursuant to Density Bonus Law Government Code section 65915, or a local density bonus ordinance, shall be considered consistent with objective standards.

(4) Project eligibility for a density bonus concession, incentive, parking reduction, or waiver of development standards shall be determined consistent with Density Bonus Law.

(5) Objective standards may include objective land use specifications adopted by a city or county, including, but not limited to, the general plan, housing overlay zones, specific plans, inclusionary zoning ordinances, and density bonus ordinances.

(6) In the event that objective zoning, general plan, subdivision, or design review standards are mutually inconsistent, a development shall be deemed consistent with the objective standards pursuant to Section 400(c) of these Guidelines if the development is consistent with the standards set forth in the general plan. (A) In no way should this paragraph be used to deem an application ineligible for the Streamlined Ministerial Approval Process when the project's use is consistent with Section 401(a)(3).

(7) Developments are only subject to objective zoning standards, objective subdivision standards, and objective design review standards enacted and in effect at the time that the application is submitted to the local government

(8) Determination of consistency with objective standards shall be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, increased housing supply. For example, design review standards or other objective standards that serve to inhibit, chill, or preclude the development of housing under the Streamlined Ministerial Approval Process are inconsistent with the application of state law.

As HCD's guidelines make abundantly clear, the City Council cannot use discretion in any way while evaluating a project's consistency with the zoning ordinance and/or General Plan standard. If the Council is allowed to act as the ministerial approval body for an SB-35 streamlined development application, they must set aside every instinct that serves them well as elected officials in order to meet the standard for ministerial approval under the law.

We implore the City of Burbank to not imperil the Council's legal responsibilities by being allowed to serve as the ministerial approval body for any streamlined development application. This course of action is a plan to fail. We believe if the City Council is allowed to act as the ministerial approval body for an SB 35 project, it is almost certain that the City Council will fail to follow the law, and Burbank will suffer a pointless, embarrassing and expensive lawsuit. Why is the City Council interested in serving as the approval body, if not to prevent the planning staff and Community Development Director from following the law? This policy will only increase the likelihood that the City will violate the Housing Accountability Act, and virtually guarantees that you will make bad-faith decisions on projects, which will trigger a minimum of $50,000 fine per unit when a judge inevitably orders you to approve projects you are required to approve. Please use your discretion, and good judgment, by following the normal, customary practice of designating the Community Development Director to serve in this capacity.

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