VENTURA
SUPERIOR COURT
FILED
MAY 17 2021
MICHAEL D. PLANET
Executive Officer and Clerk
By: _____, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF VENTURA

YES IN MY BACK YARD, Plaintiff, v. CITY OF SIMI VALLEY, Defendant.	CASE NO. 56-2020-00539590-CU-WM-VTA **TENTATIVE DECISION** HON. MARK S. BORRELL DEPT. 40

Before the court are two petitions that raise the same issue: Is the project known as Melrose West Senior Living Community, a senior assisted living facility in Simi Valley, a "housing development project" within the meaning of the Housing Accountability Act ("HAA").[1] Petitioners say it is; the respondent city says it's not. The court conducted a single hearing on both petitions and, therefore, renders a joint tentative decision[2]. This tentative decision shall also constitute the proposed statement of decision.

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[1] See Government Code, section 65580, *et seq*. All references are to the Government Code unless indicated otherwise.

[2] The other case is *JM Squared Development v. City of Simi Valley*, Case No. 56-2020-00539593-CU-WM-VTA

Background

Petitioner JM Squared Development, LLC ("JM") is the developer of the subject project. Petitioner Yes In My Back Yard ("YIMBY") is a nonprofit corporation and a "housing organization" within the meaning of the HAA.[2]

The project site is 19.2 acres in Simi Valley. (AR 03, 04, 22.) The development would occupy 1.6 acres and would include a two-story structure with 40 memory care units and 68 assisted living units. (AR 22, 913.) The proposed residential units would include sleeping areas, living areas, bathrooms, and closets. (AR 1239, 1244.) They would not include kitchens or kitchenettes; meals would be taken in a common area. (AR 665.) In addition to the living spaces, the development would include a game room, lounges, a gym, a media room, and a multi-purpose room. Originally, the project was intended to also have cottages for seniors, but during the application process the cottages were removed from the plans. It is conceded that the project is in a medium residential zone and, therefore, requires a conditional use permit (CUP) as the project exceeds the density for such zone.

JM submitted an application for a CUP on March 1, 2018 to respondent, the City of Simi Valley ("City"). Staff for the City Planning Commission initially recommended approving the project (AR 913-946), but after a public hearing the Planning Commission denied the application. Three reasons were stated for the denial. First, the proposed development would not blend in with the natural environment due to the large scale of the proposed building. Second, the proposed development would not be consistent with the General Plan regarding housing type and scale. Finally, the proposed development would

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[2] As relevant here, a " 'housing organization' means a 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." (Gov. Code, § 65589.5, subd. (k)(1)(ii)(C)(2).)

not comport with local standards for "aesthetics, character, scale, and view protection." (AR 1123-1134.)

JM appealed the denial of the CUP application to the City Council. It argued that the project fell within the provisions of the HAA and that the findings required by the act had not been made. In response, City Council staff reported to the council that the project was not a "housing development project" ("HDP") within the meaning of the HAA and, therefore, the act did not apply. (AR1349-1350.) The City Council voted to uphold the Planning Commission's denial (AR 1682-1689), finding further that there was a safety concern due to the narrow access road to the project. (AR1683).

JM and YIMBY now petition for an administrative writ of mandate directing the City reverse the denial of the CUP application and, further, compelling the City to approve the project. The City opposes these requests, asserting that the application was properly denied.

Standard of Review

The question presented to the court is a legal one. The core facts are not in dispute. What is contested is whether those undisputed facts show the project is an HDP under the HAA. For this reason, the standard of review is independent judgment.

Whether an agency has proceeded in the manner required by law is a legal issue subject to independent review where that determination rests on undisputed facts. As stated in *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 712–713:

> Our choice between independent and substantial evidence review is guided by the California Supreme Court's statement that "a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." (*Vineyard Area, supra,* 40 Cal.4th at p. 435, 53 Cal.Rptr.3d 821, 150 P.3d 709.) Thus, when plaintiffs' CEQA claim is predominantly one of procedure, we will conduct an independent review. When plaintiffs' CEQA claim disputes the factual findings made by ARB, we will review the record to determine whether the challenged finding is supported by substantial evidence.

When a local agency disapproves a project subject to the HAA without making the required findings, that entity has not proceeded in the manner required by law. (*Honchariw v County of Stanislaus* (2011) 200 Cal.App.4th 1066, 1072.) That is

precisely the issue here.

In reviewing an administrative decision under the independent judgment standard, the court is not bound by the legal determinations made by the respondent agency, but it must give appropriate consideration to an administrative agency's expertise underlying its interpretation of an applicable statute. (*Building Industry Assn. of San Diego County v. State Water Resources Control Bd.* (2004) 124 Cal.App.4th 866, 879.)

Discussion

The HAA "was designed to limit the ability of local governments to reject or render infeasible housing developments based on their density without a thorough analysis of the 'economic, social, and environmental effects of the action....' " (*Kalnel Gardens, LLC v. City of Los Angeles* (2016) 3 Cal.App.5th 927, 938, quoting § 65589.5, subd. (b).) "When a proposed development complies with objective general plan and zoning standards, including design review standards, a local agency that intends to disapprove the project, or approve it on the condition that it be developed at a lower density, must make written findings based on substantial evidence that the project would have a specific, adverse impact on the public health or safety and that there are no feasible methods to mitigate or avoid those impacts other than disapproval of the project." (*Id.*, at pp. 938-939; also see § 65589.5, subd. (j).) If petitioners establish that the HAA applies to this project, then the burden is on the City to show that its decision to disapprove the project conformed to the requirements of the act. (See § 65589.6.)

Here, the principal dispute is whether the project is an HDP within the meaning of the HAA. The act defines an HDP as "a use consisting of" one or more of three defined categories. (§ 65589.5, subd. (h)(2).) Under the first of those categories, a project is deemed to be an HDP if it consists of "[r]esidential units only." (*Id.*, subd. (h)(2)(A).) The second category of HDP is "[m]ixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential

use." (*Id.*, subd. (h)(2)(B).) The final category of use constituting an HDP is "[t]ransitional housing or supportive housing." (*Id.*, subd. (h)(2)(C).)

Petitioners contend this project is an HDP under any of these definitions. The City says none of these definitions apply. Because the court concludes that the project would be "a use consisting of . . . [m]ixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use," it limits its analysis solely to that definition.

The City argues in its opposition brief that the project does not involve a "residential *unit*" – a phrase found in the first of the three definitions of HDP. (See § 65589.5, subd. (h)(2)(A), emphasis added.) The City does not, however, clearly address whether the project would consist of a mixed-use including "residential . . . *uses*" – a distinct element of the second definition. (*Id.*, subd. (h)(2)(B), emphasis added.) Rather, the City seems to confound these concepts – residential *unit* and residential *use* – but, to the court, there seems no justification to do so. When the Legislature uses distinct terms with a subdivision, it must be inferred that distinct meanings were intended absent a compelling reason to conclude otherwise. (See *People v. Santos* (2020) 53 Cal.App.5th 467, 473.) Here, no such reason has been demonstrated.

The HAA does not define a "residential use." It does, however, expressly define several other terms. This implies this phrase was not intended to have a technical meaning. Nor is a technical meaning implied by the manner in which this phrase is used in the act. Therefore, the court focuses on the meaning of the phrase in ordinary speech.

The common meaning of "residential use" is not difficult to grasp: a "residential use" is where one uses a location as a residence. The focus of the definition centers how the place is used and not the characteristics of the place.

This begs the question: what is a "residence"? Generally, a residence as a place where someone actually lives. (See https://www.merriam-webster.com/dictionary/residence ["the place where one actually lives as distinguished from one's domicile or a place of temporary sojourn"]; Black's Law Dictionary (11th ed. 2019) ["The place where

one actually lives, as distinguished from a domicile"].) A "residence" is in contrast to a "domicile." "A person can have two places of residence, such as one in the city and one in the country, but only one domicile." (https://legal-dictionary.thefreedictionary.com/Residence.) A "domicile" is one's permanent home. (See https://www.merriam-webster.com/dictionary/domicile ["a person's fixed, permanent, and principal home for legal purposes"]; Black's Law Dictionary (11th ed. 2019) ["a person's true, fixed, principal, and permanent home, to which that person intends to return and remain even though currently residing elsewhere"].) On the other hand, "residence" implies something more permanent that, for example, visiting with friends or staying for a short time in a hotel. (See https://www.definitions.net/definition/residence ["any address at which you dwell more than temporarily"].)

The City contends that the project would not consist of "residential uses." This contention, however, stands in conflict with the City Planner's testimony. The City Planner described this project as a "residential care facility" (AR 1691) with a "residential use" (AR 1699). Nevertheless, the City argues that the living units of this project do not involve "residential uses" because the units would not include kitchens or kitchenettes. But this limitation is not supported by anything identifiable in the provisions of the HAA or from the common understanding of the terms involved. Perhaps because of this, the City attempts to support its position with sources of information unrelated to the HAA. The attempt is unpersuasive. No showing has been made that the Legislature intended these more restrictive meanings to be used to construe the act. (See § 65589.5, subd. (a)(2)(L) ["It is the policy of the state that this section 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 City also asserts that its position is supported by bills not passed by the Legislature. But the Legislature does not make law when it does not enact a bill. The courts apply the laws that *are passed*, not the ones that aren't. Nor are unpassed bills particularly helpful in understanding what the Legislature intended when it passed a

different bill at a prior time. (See *Nevarrez v. San Marino Skilled Nursing & Wellness Centre, LLC* (2013) 221 Cal.App.4th 102, 133 [courts "do not consider unsuccessful subsequent bills to be helpful in determining the Legislature's earlier intent"].)

The evidence shows that the intended residents of the project would use the living units as their residences. That is, this would be the place where residents would actually live – more than in a transitory sense and not quite as permanently as a legal domicile. Thus, the project does include a component of "residential use." It also includes a component of "non-residential use," consisting of administrative offices and, among other things, a hair salon and a gym. The space devoted to residential use is considerably more than two-thirds of the total area. Therefore, this project is an HDP within the meaning of subdivision (h)(2)(B) of section 65589.5 because it would consist of "[m]ixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use."

Because the project is an HDP, the HAA applied to the review of JM's application for a CUP. This finding shifts the burden to the City to establish that its decision to disapprove the project "conformed to all of the conditions specified in Section 65589.5." (§ 65589.6.) Among other things, section 65589.5 requires a local agency that disapproves a project to make certain findings "[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 application was deemed complete." (§ 65589.5, subd. (j)(1).) In that instance, the agency must make "written findings supported by a preponderance of the evidence on the record that both of the following conditions exist:

> (A) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, 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.

(B) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

(§ 65589.5, subd. (j)(1).)

The three reasons given by the City's Planning Commission for denial of the CUP application, and later adopted by the City Council, were predicated on subjective factors such as whether the project would blend in with the surroundings or comport with local standards for things like aesthetics, character and scale. The City continues to argue that these findings exempt this project from the HAA. The court disagrees. The 1999 amendments to subdivision (j) of section 65589.5 were "intended to strengthen the law by taking away an agency's ability to use what might be called a 'subjective' development 'policy' (for example, 'suitability') to exempt a proposed housing development project from the reach of subdivision (j)." (*Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066, 1076.) Therefore, the court finds that the City had to make the findings required by subdivision (j) of section 65589.5 to disapprove the project. The court further finds that the City did not make those findings.

Arguably, the City Council, on the appeal of the denial of the CUP application, made a finding consistent with section 65589.5, subdivision (j)(1)(A), concerning "a specific, adverse impact upon the public health or safety." The City Council found that the 40-foot wide Cochran Street road size presented a difficulty of turnaround for large vehicles and area congestion during emergency situations, all of which posed potential safety concerns. (AR 1682-83.) But, at best, this only represents half of what the HAA required the City to find. The City did not make the finding required by section 65589.5, subd. (j)(1)(B), that there "is no feasible method to satisfactorily mitigate or avoid [these] adverse impacts" other than disapproving the project. Therefore, the City has not demonstrated that the disapproval of the project "conformed to *all* of the conditions specified in Section 65589.5." (§ 65589.6, emphasis added.)

Petitioners, therefore, are entitled to a remedy. The nature of that remedy is the

next point of dispute between the parties.

When a local agency disapproves a project without making the findings required by section 65589.5, the court shall issue an order compelling one of two possible forms of relief. (See section 65589.5, subd. (k)(1)(A).) Which of those two forms of relief the court must order depends on whether "the court finds that the local agency acted in bad faith when it disapproved . . . the housing development . . . in violation of [section 65589.5]." When a local agency disapproves a project in bad faith the court may order the agency to approve the project. Therefore, the court addresses that issue first.

The HAA does not define "bad faith." Perhaps "bad faith" is a term that, as frequently as it is used but as seldom as it is defined, has an "I know it when I see it" quality.[3] Black's Law Dictionary (11th ed. 2019), citing Comment (d) to the Restatement (Second) of Contracts section 205, gives several examples of "bad faith" in the law of contracts and that, by rough analogy, provides some guidance in this context: "evasion of the spirit of the [act], lack of diligence and slacking off, willful rendering of imperfect [compliance with the act], abuse of a power [granted by the act]." Synthesizing these concepts here, it would appear that a local agency acts in "bad faith" under the HAA when it disapproves a project as a result of either an inexcusable indifference to the requirements of section 65589.5 or a willful failure to comply.

Here, neither an inexcusable indifference nor a willful failure to follow the requirements of the HAA has been established. Although the court has not embraced the City's argument that the HAA does not apply, it has not been persuaded that those argument are either pretextual or manifestly unreasonable. Neither side has directed the court to statutory or case law that provides clear guidance as to the applicability of the HAA to this set of facts. The answer to that question is one of statutory interpretation based on analysis and analogy, and, importantly, one where reasonable legal minds may differ. The City has not acted in bad faith.

[3] A phrase given legal significance by Justice Potter Stewart in *Jacobellis v. Ohio* (1964) 378 U.S. 184, 197, 84 S.Ct. 1676, 12 L.Ed.2d 793.

Therefore, the remedy petitioners are entitled to is a "judgment compelling compliance with [section 65589.5] within 60 days." (Section 65589.5, subd. (k)(1)(A)(ii).) That relief is granted. In addition, the court shall retain jurisdiction to ensure that its judgment is carried out. (*Ibid.*)

This tentative decision is the court's proposed statement of decision and shall become the court's final statement of decision unless, within 10 days after announcement or service of the tentative decision (plus five days for service by mail), a party specifies those principal controverted issues as to which the party is requesting a statement of decision or makes proposals not included in the tentative decision. (See Code Civ. Proc. § 632; Cal. Rules of Court, Rule 3.1590, subd. (c).) If no such request/proposal is made within the specified time (see Cal. Rules of Court, Rule 3.1590, subd. (d)), counsel for petitioners is to prepare, serve and submit a proposed judgment within 20 days of the service of this tentative decision.

The clerk is directed to serve this tentative decision upon the parties.

Dated: May 17, 2021

MARK S. BORRELL
JUDGE OF THE SUPRIOR COURT

PROOF OF SERVICE
CCP § 1012, 1013a (1), (3) & (4)

STATE OF CALIFORNIA)
) ss.
COUNTY OF VENTURA)

Case Nos: 56-2020-00539590-CU-WM-VTA
Case Title: Yes In My Back Yard v. City of Simi

I am employed in the County of Ventura, State of California. I am over the age of 18 years and not a party to the above-entitled action. My business address is 800 Victoria Avenue, Ventura, CA 93009. On the date set forth below, I served the within:

TENTATIVE DECISION

on the following named parties:

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☒ **BY MAIL**: I caused such envelope to be deposited in the mail at Ventura, California. I am readily familiar with the court's practice for collection and processing of mail. It is deposited with the U.S. Postal Service on the dated listed below.

☐ **BY FACSIMILE**: I caused said document(s) to be sent via facsimile to the interested party at the facsimile number set forth above from telephone number (805)_____.

☐ **BY ELECTRONIC MAIL:** I caused said document(s) to be sent via email to the interested parties at the email addresses set for above.

I declare under penalty of perjury that the foregoing is true and correct and that this document is executed on May 17, 2021, at Ventura, California.

By: _____
Isabel H. Alarcon, Clerk