SAN BRUNO PLANNING COMMISSION SPECIAL MEETING

November 7, 2023

Public Comment for Item 7.a.

YIMBY Law

877 Cedar Street #150
Santa Cruz, CA 95060
hello@yimbylaw.org

YIMBY LAW

11/6/2023

San Bruno Planning Commission
1555 Crystal Springs Road
San Bruno, CA 94066

mlaughlin@sanbruno.ca.gov
Via Email

Re: 840 San Bruno Ave West
APN 020-071-050

Dear San Bruno Planning Commission,

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 Planning Commission 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.

This is a 100% affordable housing project that will consist of 341 units in two 10-story buildings. This is also a Major Transit project due to its walkability to the nearby Caltrain.

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.

The above captioned proposal is zoning compliant and general plan compliant, therefore, your local agency must approve the application, or else make findings to the effect that the proposed project would have an adverse impact on public health and safety, as described above. Should the City fail to comply with the law, YIMBY Law will not hesitate to take legal action to ensure that the law is enforced.

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

Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law
Three Embarcadero Center, 12th Floor | San Francisco, CA 94111-4074
Telephone: 415.837.1515 | Facsimile: 415.837.1516
www.allenmatkins.com

David H. Blackwell
E-mail: dblackwell@allenmatkins.com
Direct Dial: 415.273.7463 File Number: 391161.00007/4857-2568-9223.3

Via Electronic Mail (mlaughlin@sanbruno.ca.gov)

November 6, 2023

Planning Commission
City of San Bruno
567 El Camino Real
San Bruno, CA 94066

Re: November 7, 2023 Planning Commission Meeting
Agenda Item 7.A: 840 San Bruno West

Dear Commissioners:

This office represents JEMCOR Development Partners, the applicant for the proposed affordable housing apartment community at 840 San Bruno Avenue West ("Project"). This correspondence relates to the above-referenced Agenda Item, specifically this Commission's scope of discretion when reviewing the Project. As such, this correspondence supplements and incorporates the discussion set forth on pages 3-6, 8-10, and 13-16 of the City Planning Department's Staff Report, and does not seek to replicate that discussion here. While the Staff Report accurately sets forth the fundamentals of the relevant statutory framework, we believe that the Commission would benefit from a more detailed discussion of these statutes and their effect on a local agency's deliberative process.

We submit this correspondence in light of the proceedings conducted by the Architectural Review Committee ("ARC") on September 28, 2023. During that meeting, the ARC strayed significantly beyond the matters upon which this Commission may consider when reviewing the Project. Moreover, many comments provided during the ARC proceeding were subjective or unrelated to the proper scope of review. In fact, the substance and tenor of many of the comments underscore why the state law discussed below is critical to address the state's housing crisis.

This letter provides the Commission with the established legal framework when considering multifamily residential projects that are protected by the State's statutory regime, as here. We respectfully submit this information to help focus the deliberative process to the relevant issues, and to thereby avoid a repeat of the ARC proceedings.

I. APPLICABLE LAW

A. Housing Accountability Act

1. Background

The Housing Accountability Act ("HAA") establishes the state's overarching policy that a local government may not deny, reduce the density of, or make infeasible qualifying housing development projects. The express intent of the HAA is to promote housing development: "It is the policy of the state that this section [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." (Gov. Code § 65589.5(a)(2)(L).)

As enacted in 1982, the original HAA directed local governments to approve housing projects that complied with local land use standards. Now codified in subdivision (j), the HAA specifies that a city cannot disapprove a project or condition it to be developed at a lower density if the project complies with all local standards, unless the city finds that the project would have non-mitigatable health or safety impacts. Subdivision (j) applies to both market-rate and affordable housing projects.

Eight years after the original HAA was enacted, and upon the recognition that affordable housing encountered the most local resistance, the HAA was amended to encompass greater protections for affordable housing projects by adding subdivision (d), which prohibits a city from denying a project or conditioning approval in a manner that renders it infeasible, unless the city can make one of several specific findings, discussed immediately below. As an 100% affordable housing project that complies with the City's objective development standards, the Project satisfies *both* subdivisions (d) and (j).

2. Legal Standards

In order for a local agency to disapprove a housing development project, it must base its decision upon written findings supported by a preponderance of the evidence on the record. (Gov. Code § 65589.5(d),(j)(1).) The phrase "disapprove a housing development project" includes disapproving a project application, including any required land use approvals or entitlements necessary for the issuance of a building permit. (Gov. Code § 65589.5(h)(5).) If a court determines that the local agency violated the HAA, the court: may direct the local agency to comply with the HAA; may direct it to approve the project if it determines the agency acted in bad faith; shall award attorneys' fees and costs; and may impose fines and multiply those fines under certain circumstances. (Gov. Code § 65589.5(k)(1)(A).)

As noted above, the HAA has two prongs: subdivision (d) for affordable housing projects, and subdivision (j) for any housing project that is consistent with the local agency's objective planning, zoning and design standards.

a. Section 65589.5(d)

Under subdivision (d), if a housing development project provides at least 20% low income (80% AMI) housing or 100% moderate income housing, then a city may not deny the project or apply conditions making the project infeasible unless one of five findings can be met:

1. The city has a compliant housing element and RHNA numbers have been met or exceeded for all income categories for the proposed project;

2. The proposed project has a specific, adverse impact[1] upon the public health or safety, and there is no feasible method to mitigate or avoid impact.

3. Denial or conditions are required to comply with specific state or federal law and there is no feasible method to comply without rendering the development unaffordable to low-income households.

4. The housing development project is proposed on land zoned for agriculture or resource preservation and there is no adequate water or wastewater facilities to serve the project.

5. The project is inconsistent with both zoning and general plan designations as those existed at the time the application was deemed complete, and the city has adopted a revised housing element that is substantially compliant with state law.

(Gov. Code § 65589.5(d).)

The Project consists of 100% affordable units, and is subject to subdivision (d). None of the above findings can be made here. Therefore, the Commission must approve the Project.

a. Section 65589.5(j)

Even if the Project did not qualify under subdivision (d), this Commission could not make the findings for disapproval under subdivision (j). Government Code section 65589.5(j), which applies to any housing development that complies with applicable, objective[2] local planning,

---

[1] The "specific, adverse impact" basis to disapprove an HAA project shall "arise infrequently." (Gov. Code § 65589.5(a)(3).)

[2] "'Objective' means involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and

zoning, and subdivision regulations, sets forth the limited findings that a city may rely upon when either disapproving or imposing a condition that the project be developed at a lower density. In short, this subdivision of the HAA requires that the local agency find, based upon a preponderance of the evidence, that:

- 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.
- 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.

(Gov. Code § 65589.5(j)(1).)

Even if the Project was analyzed under subdivision (j) instead of subdivision (d), these findings for disapproval cannot be made with regard to the Project. There is simply no evidence, nor could such evidence be created, that the Project would have a specific, adverse impact based on written public health or safety standards.

Most of the ARC's commentary and criticism centered on subjective development standards. Under the HAA, subjective standards cannot be considered. (*California Renters Legal Advoc. & Educ. Fund v. City of San Mateo* (2021) 68 Cal. App. 5th 820, 840.) Therefore, we urge this Commission to consider only the City's objective development standards when reviewing the Project. Also please note that Planning Staff has determined that the Project complies with those standards after applying the provisions of the State Density Bonus Law, discussed immediately below.

B. Density Bonus Law

The other pro-housing statute that the Commission must recognize is the Density Bonus Law (DBL), which "is a powerful tool for enabling developers to include very low, low, and moderate-income housing units in their new developments." (*Wollmer v. City of Berkeley* (2011) 193 Cal. App. 4th 1329, 1339.) The DBL is one of several California statutes designed to

---

knowable by both the development applicant or proponent and the public official." (Gov. Code § 65589.5(h)(8).)

implement "an important state policy to promote the construction of low-income housing and to remove impediments to the same." (*Bldg. Indus. Ass'n v. City of Oceanside* (1994) 27 Cal. App. 4th 744, 770; Gov. Code § 65582.1(f).)

The DBL has three distinct primary components: (1) density bonuses; (2) incentives/ concessions; and (3) development standard waivers. Although interrelated, each component serves a different purpose and is governed by unique standards. Each component is discussed briefly below. For purposes of the Project review, the Commission should focus on the first and third components.

1. Density Bonus

Section 65915(b)(1) provides that requests for a density bonus must be granted "when an applicant for a housing development seeks and agrees to construct a housing development" that meets one or more of the statute's thresholds. Once a project meets one of the minimum thresholds, the size of the density bonus is governed by the amount of affordable units the project will provide. Under the DBL, a local agency has no discretion with regard to the density bonus award; so long as the project provides the requisite affordability, the formulaic bonus must be awarded. (*Bankers Hill 150 v. City of San Diego* (2022) 74 Cal. App. 5th 755, 769–70.)

Staff has determined that the base density for the Project is 190 units. Applying the 80% density bonus set forth in Section 65915(f)(3)(D)(i) yields 341 total units.

2. Incentives

Applicants for density bonuses may also request specific incentives or concessions from cities. Thus, "when an applicant seeks a density bonus for a housing development that includes the required percentage of affordable housing, section 65915 requires that a city not only grant the density bonus, but provide additional incentives or concessions where needed based on the percentage of low-income housing units." (*Wollmer v. City of Berkeley* (2009) 179 Cal. App. 4th 933, 944.) Concessions/incentives (referenced as an "incentives" herein as the statute does not distinguish the terms) are broadly applied and may include reductions in development or architectural design standards intended to reduce the cost of construction to facilitate the development of affordable housing (Gov. Code § 65915(k)). Unlike waivers requested pursuant to Section 65915(e), concessions are not limited to relief from development standards. Section 65915(k), which defines concessions, includes both reductions in development standards ((k)(1)) and any other concessions proposed by the developer "that result in identifiable and actual cost reductions to provide for affordable housing costs" (§ 65915(k)(3)).

The required written findings to deny an incentive request, which must be supported by substantial evidence in the record, are as follows:

> (A) The concession or incentive does not result in identifiable and actual cost reductions, consistent with subdivision (k), to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c).
>
> (B) The concession or incentive would have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon public health or safety or on any real property that is listed in the California Register of Historical Resources and for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact without rendering the development unaffordable to low-income and moderate-income households.
>
> (C) The concession or incentive would be contrary to state or federal law.

(Gov. Code § 65915(d)(1).)

A local agency bears the burden of proof if it denies an incentive request. (Gov. Code § 65915(d)(4).) For example, a "municipality has the burden of proof of demonstrating that an incentive would *not* generate cost savings." (HCD Letter of Technical Assistance to City of Larkspur, May 12, 2022, p. 3.) Section 65915(d)(1) requires cities to approve incentives unless specified written findings based on substantial evidence are made, and the only reasons for denial are set forth in subdivisions (d)(1), referenced above. This burden was further established in *Schreiber v. City of Los Angeles* (2021) 69 Cal.App.5th 549, 555, where the court of appeal explained that there is a presumption that an incentive will result in cost reductions and that an applicant "is not required to establish that cost reductions will result." Instead, a city must approve the incentive request unless it makes one of the written findings set forth in Section 65915(d)(1). (*Ibid*.) "By requiring the city to grant incentives unless it makes particular findings, the statute places the burden of proof on the city to overcome the presumption that incentives will result in cost reductions." (*Id*. at 556.)

3. Development Standard Waivers

A density bonus applicant may also request a waiver or reduction of development standards that would have the effect of physically precluding the construction of the project at the densities or with the incentives permitted under the statute. (Gov. Code § 65915(e)(1).) The definition of a "development standard" includes a site or construction condition, including, without limitation, local height, setback, floor area ratio, onsite open space, and parking area ratio requirements that would otherwise apply to residential development pursuant to ordinances, general plan elements,

specific plans, charters, or other local condition, law, policy, resolution, or regulation. (Gov. Code § 65915(o)(1).)

A request for a development standard waiver neither reduces nor increases the number of incentives to which the developer is otherwise entitled. (Gov. Code § 65915(e)(2).) Furthermore, there is no limit on the number of waivers that may be issued. Even if the developer does not submit a request for a development standard waiver, a city is prohibited from applying a development standard that would have the effect of physically precluding the construction of the project at the densities or with the incentives permitted under the DBL. (Gov. Code § 65915(e)(1).)

As with incentives, recent case law has clarified the legal principles regarding waivers. The *Schreiber* case confirms that a city may refuse a request to waive or reduce development standards *only* if it makes written findings that the waiver or reduction would have a specific adverse impact on the public health or safety. (*Id*. at 556; Gov. Code § 65915(e)(1).) In addition, another recent case upholding a city's approval of a density bonus project confirmed that waivers are based on the project as proposed by the developer: "even if we assume the Project as designed is inconsistent with some of the City's design standards, the Density Bonus Law would preclude the City from applying those standards to deny this project." (*Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755, 775.) Therefore, a local agency may not respond to a waiver request that a project could be redesigned to avoid the need for a waiver. (*Id*. at 774-775 [rejecting argument that the project "could have been built more horizontally" to comply with design standards."].) As the state Department of Housing and Community Development recently advised another local agency that it cannot deny a waiver request based on the possibility of a redesigned project, "the courts have made it very clear that if a project qualifies under [the Density Bonus Law], and if waivers are needed to physically allow that project to go forward with the incentives and concessions granted, the waivers must be granted." (1/20/22 Notice of Violation to City of Encinitas.)

Pursuant to the applicable law, the Project's waiver requests must be granted.

II. CONCLUSION

Based on the foregoing, JEMCOR respectfully submits that because the Project is subject to the DBL and is also protected by both prongs of the HAA, there is no basis upon which this Commission may deny or reduce the density of the Project, nor may it seek to redesign the Project. As such, JEMCOR respectfully requests that the Commission approve the Project at the upcoming Commission meeting.

Very truly yours,

David H. Blackwell

cc: Nathan Blair
Jonathan Emami
Brian Heaton, HCD