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YIMBY LAW

8/27/2024

Brentwood City Council
City Hall, 150 City Park Way
Brentwood, CA 94513

cityclerk@brentwoodca.gov
Via Email

Re: Appeal for the Bridle Gate Project

Dear Brentwood 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, City Council 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 approximately 92.96 acre-project consists of constructing 272 single-family detached residences along with improvements within the project, such as two parks, open space, stormwater detention and treatment areas, utility connections and construction of an internal roadway network. The residential area would include lot sizes ranging from 5,000 to 15,930 square feet and would use around 68 acres of the project site, resulting in a density of approximately 4.0 dwelling units per acre. One six-acre parcel of land northwest of the project site and a 2.49-acre parcel of land southeast of the project site would be used as public parks. At the time of project's application submission, the affordable housing ordinance in place (Ordinance No. 1014) required 10% of the total units to be affordable, and as such, the project applicant has entered into an Affordable Housing Agreement with the City to provide a minimum of 27 affordable units at the requisite affordability levels.

Planning Commission

On July 16, 2024, the City of Brentwood's Planning Commission held a public hearing to consider the project and voted unanimously to deny the project despite the City staff recommending approval. Among various factors, the Planning Commission seemed particularly concerned with the project possibly exacerbating traffic congestion. The Planning Commission deduced that none of the options meant to tackle traffic concerns would reduce *existing* traffic, even though City staff rightly explained that the options were designed to reduce traffic resulting from the project and that the Applicant does not bear responsibility for solving traffic problems that would exist regardless of the project's existence.

In addition, the Planning Commission expressed concerns with the number of potentially significant impacts identified in the EIR. However, City staff explained that the Planning Commission was actually referring to the initial study, which only served to identify what areas needed further analysis in the EIR. In truth, the EIR did not identify any significant and unavoidable impacts and instead presented mitigation measures to ensure impact would be at a less-than-significant level.

Zoning Standards

The General Plan designates the majority of the project site as Residential Low Density (R-LD), allowing for development between 1.1 and 5.0 dwelling units per gross acre. The proposed project would have a density around 4.0 dwelling units per acre. The zoning for the project site is PD-36, set forth in Brentwood Municipal Code (BMC) Chapter 17.486. In the lawsuit concerning this project application, the City itself took the position that the appropriate residential development standards are those for Subarea C, which is consistent with the property's General Plan designation of Residential Low Density. The project complies with the minimum lot size of 5,000 square feet for PD-36, Subarea C as well as development standards for open space and recreation. Lastly, the City cannot impose the development standards of the only other residential subarea–Subarea D–as its minimum lot size requirement of 10,000 square feet would substantially decrease the density of the project in a way that conflicts with State law.

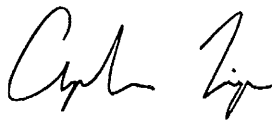
Additionally, because the project provides 5% of the units as affordable to very-low-income households, Government Code § 65915 requires that the City waive any development standards that would physically preclude construction of the project at the density proposed. The City must provide an unlimited number of waivers of development standards, regardless of whether the applicant has requested such waivers. Importantly, the use of waivers does not render the project noncompliant for purposes of California Government Code § 65589.5, the Housing Accountability Act, which states, "For purposes of this section, the receipt of a density bonus, incentive, concession, waiver, or reduction of development standards pursuant to Section 65915 shall not constitute a valid basis on which to find a proposed housing development project is inconsistent, not in compliance, or not in conformity, with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision . . . ." (Government Code § 65589.5(j)(3).) Lastly, the California Department of Housing and Community Development (HCD) has found that a city may not require an applicant to redesign a § 65915 project to avoid the need for waivers. (*See* Department of Housing and Community Development, 3832 18th Street Project – Notice of Violation, December 29, 2022.)

The proposed project is consistent with the City's general plan and complies with the PD-36 development standards. As such, the Housing Accountability Act prohibits localities from reducing the density of or 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 specific findings that the proposed housing development would be a threat to public health and safety.

Therefore, your local agency must approve the project, or else make findings to the effect that the proposed project would have an unmitigable 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.

Sincerely,



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September 5, 2024

VIA E-MAIL

Brentwood City Council
City Hall, 150 City Park Way
Brentwood, CA 94513

Re: Bridle Gate Project Appeal

Dear Mayor Bryant and Councilmembers:

Our office represents the project applicant, WCHB Development, LLC. On August 27, City Council heard an appeal of the Planning Commission's denial of this housing development project. We heard the community's concerns loud and clear, and although we are ready to commence legal action if the project is denied, we would like to find a path forward that responds to the community's preferences.

Specifically, Councilmembers listed the following issues as reasons to deny the project:

1. Preference for one larger park instead of two smaller parks
2. Preference for two connections to Sand Creek Road
3. Concern that the existence of noise from Highway 4 will not be disclosed to future homebuyers
4. Concern that the project does not reduce existing vehicle-miles traveled ("VMT")
5. Concern that ridgelines will be deteriorated
6. Concern that first responders cannot move quickly through traffic
7. Assertion that there should be fewer homes

As discussed below, these clearly are not legally permissible grounds to deny the project or reduce its density. Nevertheless, the project's engineers are working overtime to prepare a configuration that includes one larger park and two connections to Sand Creek Road. The applicant is willing to offer this compromise pending confirmation from the engineers. We expect it will be ready for your review shortly.

Additionally, the applicant will commit to disclosing the existence of potential noise from the highway to future homebuyers who might be impacted, as Council requested. Moreover, the project will comply with the City's adopted standards and will implement the mitigation measures prescribed by the Final REIR, including soundwalls and STC 34 windows.

We address Council's remaining concerns in turn:

Concern that the project does not reduce existing vehicle-miles traveled ("VMT")

VMT was thoroughly studied using the analysis methodology required by the Contra Costa Transportation Authority's Growth Management Program. This is the applicable VMT model in Brentwood. While one Councilmember asserted that a different model that she found on the internet should be used (the Fehr and Peers screening tool), this is not a proper model for this analysis. In fact, its website includes the following disclaimer: "Fehr & Peers makes no warranty regarding the data's accuracy, quality, or appropriate use. This data set is intended to complement other VMT data sources, such as regional or local travel demand models. Since the VMT estimates are new and have not been fully validated or peer reviewed, the data is offered as-is and should be thoroughly reviewed for reasonableness in any applications."

An engineering memorandum will follow shortly, explaining in detail that the correct methodology was used and reconfirming the validity of the VMT study.

Concern that ridgelines will be deteriorated

General Plan Policy COS 7-1 states: "Protect Brentwood's ridgelines (hilltops and steep hillsides) from erosion, slope failure, and development." The project complies with this policy and avoids degrading any ridgeline by dedicating 25 acres of permanent open space along the western property line. The project is sited within the area designated by the City for residential development and does not encroach into the area designated for open space. The Planning Commission's findings are simply incorrect.

But even if the Planning Commission's findings were correct, this type of finding cannot be used to deny the project. The Housing Accountability Act ("HAA") only allows a local government to base a project disapproval or density reduction on applicable *objective* code standards. (Gov. Code § 65589.5(j)(1)(A)-(B); *see also Cal. Renters Legal Advocacy & Educ. Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 844.) The HAA defines "objective" as "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 knowable by both the development applicant or proponent and the public official." (Gov. Code § 65589.5(h)(8).)

Policy COS 7-1 is not an outright prohibition against ridgeline development and includes no external or uniform benchmark; it is merely a general goal, akin to policies that encourage consistency with "neighborhood character." Courts are clear: such policies are preempted by the HAA. (*California Renters Legal Advoc. & Educ. Fund v. City of San Mateo* (2021) 68 Cal. App. 5th 820.)

Concern that first responders cannot move quickly through traffic

Likewise, this concern is not an objective standard. While this concern is aimed at protecting public health and safety – which are clearly important to all – the HAA prohibits project denial without a finding that the 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," and "[t]here is no feasible method to satisfactorily mitigate or avoid the adverse impact." As defined in the HAA, "'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." (Gov. Code § 65589.5(j)(1).) No such written benchmark is violated by the project. In fact, the Final REIR specifically studied these issues and determined that there will not be a significant unmitigated impact on emergency response services. (*See* Mitigation Measures XV-1, XV-2, and XV-3.)

Assertion that there should be fewer homes

The project is being developed consistent with the General Plan. The zoning for the project site in BMC Chapter 17.486 is PD-36, but the corresponding map does not show any subarea boundaries. City Staff has explained that subarea C standards apply to the project and determined that the project complies with all applicable, objective standards. This determination is binding.

The HAA requires that a determination of noncompliance be issued within 60 days of filing a complete application. (Gov't. Code § 65589.5(j)(2)(A).) If the city fails to do so, "the housing development project shall be deemed consistent, compliant, and in conformity with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision." (Gov. Code § 65589.5(j)(2)(B).) The City did not issue a notice of noncompliance on any of the above bases within the requisite 60-day timeframe (approximately three years ago). As a result, the project is deemed compliant with all applicable standards by operation of law.

Under the HAA, compliance determinations are governed by a "reasonable person" standard that favors project approval. The question is merely whether "substantial evidence . . . would allow a reasonable person to conclude that the housing development project" complies with applicable standards. (Gov. Code § 65589.5(f)(4).) We respectfully posit that learned City planning staff are reasonable people, and their determination that the project complies with all objective standards must be accepted as true by a reviewing court. To resolve any doubt: in an HAA case, the City, rather than the project sponsor, bears the burden of proof to demonstrate that its decision conformed to the HAA. (Gov. Code § 65589.6.)

As a code-compliant project, the Bridle Gate application must be approved at the density proposed. Moreover, SB 330 prohibits the imposition of a cap on the number of homes proposed.

Waivers of development standards

The applicant has committed to dedicating five percent of the units as affordable to very low-income households. The exact affordability levels were provided to the City Clerk in writing prior to the appeal hearing. As such, the project qualifies for the protections of Govt. Code § 65915, the state density bonus law ("DBL").

While the project qualifies for the DBL's protections, it does not actually seek a density bonus or incentives/concessions. (These are not required in order to qualify for the DBL.) However, a project that includes five percent VLI units qualifies for unlimited "waivers" of development standards. These waivers are automatic and do not need to be requested by the applicant. If there is a development standard that would preclude construction of the project as proposed by the applicant, the development standard must be waived. The state Department of Housing and Community Development ("HCD") has been clear: a city cannot ask the applicant to redesign a density bonus project to avoid the need for waivers. The project must be approved as proposed:

> Once a project qualifies for a density bonus, "the law provides a developer with broad discretion to design projects with additional amenities even if doing so would conflict with local development standards." *Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App 5th 755, 774-75 [289 Cal.Rptr.3d 268, 282]. Similarly, once a project qualifies for a density bonus, the SDBL does not authorize a local agency to deny a proposed waiver, including by way of a required re-design, based on the idea that the project conceivably could be redesigned to accommodate the same number of units without amenities. *Wollmer v. City of Berkeley* (2011)193 Cal.App.4th 1329, 1346-47 [122 Cal.Rptr.3d 781, 793].

(Department of Housing and Community Development, 3832 18th Street Project – Notice of Violation, December 29, 2022.)

The City Attorney stated at the hearing that a density bonus application must be submitted at the beginning of the application process. With all due respect, that requirement applies to Brentwood's *local* density bonus program. (BMC § 17.725.006(C).) The state DBL does not include such a requirement, and state law preempts any attempt by a local government to impose local constraints on the state DBL. ("A local ordinance is preempted if it conflicts with the density bonus law by increasing the requirements to obtain its benefits." (*Schreiber v. City of Los Angeles* (2021) 69 Cal. App. 5th 549, 558, *citing Latinos Unidos Del Valle de Napa Y Solano v. County of Napa* (2013) 217 Cal.App.4th 1160, 1169.)

And no notice of a density bonus is required in this case in any event, since no density bonus or incentives/concessions are requested.

The project complies with all applicable standards. Yet even if it did not, the items identified by City Council as bases to deny the project would be automatically waived pursuant to Gov. Code § 65915, California's state density bonus law.

Penalties for violating the HAA

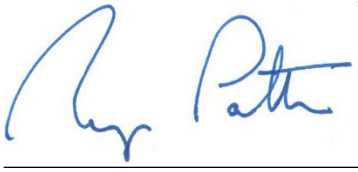
As Councilmembers noted, penalties for violating the HAA are severe. Knowingly denying this project without a legitimate basis would qualify as bad faith, potentially subjecting the City to fines of at least $50,000 per housing unit. (Gov. Code § 65589.5(l).) The applicant would also incur severe economic damages resulting from such a denial and would seek to recover those damages from the City, in addition to its attorney's fees as authorized by law. Our firm has extensive experience litigating these issues, and we are confident that a court will agree with our analysis.

Conclusion

It is our sincere hope that we can find a solution that responds to the community's concerns while allowing this housing development project to move forward as required by law. The applicant has owned the property since 1991, and it is time for this experienced developer to develop the property and provide much needed housing to the community. We anticipate having plans ready for your review in the near future and will be happy to engage further with City staff. We urge City Council to not finalize an unlawful disapproval.

Very truly yours,

PATTERSON & O'NEILL, PC



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