

September 12, 2024

VIA E-MAIL

Bryan Swanson, Director
Community Development Director
City of Saratoga
13777 Fruitvale Avenue
Saratoga, CA 95070

**Re: Formal Development Application Pursuant to the Builder's Remedy for
14486 Oak Place (SB 330 Application No. CPX24-0011)**

Dear Mr. Swanson:

Our client Deepak Chandani ("Applicant") hereby submits a Formal Development Application for his proposed housing development project ("Project") located on 14486 Oak Place with Assessor's Parcel No. 397-22-005 ("Project Site") in the City of Saratoga ("City"). The Applicant previously submitted a preliminary application ("Preliminary Application") pursuant to Senate Bill 330 ("SB 330") and the Builder's Remedy on March 19, 2024 for four residential units and was assigned Application No. CPX24-0011. This letter and the enclosed information and materials constitute the submittal materials required by the City's application checklists for a formal development application ("Formal Application"), which is being submitted fewer than 180 days after the abovementioned Preliminary Application submittal date, in compliance with SB 330. (Gov. Code, § 65941.1, subd. (d)(1).) The permit processing fees will be provided separately by the Applicant.

1. Builder's Remedy Pursuant to the Housing Accountability Act

The Project is protected by the Builder's Remedy provisions of the Housing Accountability Act ("HAA"). (Gov. Code, § 65589.5.) These provisions prohibit a city that does not have an adopted housing element that is substantially compliant with Housing Element Law (Gov. Code, §§ 65580 *et seq.*) from disapproving or conditioning in a manner that renders infeasible a housing development project "for very low, low-, or moderate-income households,"¹ even where the project is inconsistent with both the city's zoning ordinance and general plan land use designation.² (Gov. Code, § 65589.5, subd. (d)(5).)

The California Department of Housing and Community Development ("HCD") has clarified that "a jurisdiction does not have the authority to determine that its adopted element is

¹ Projects for very low, low-, or moderate-income households are defined to include projects that provide 20 percent of the units for lower income households as defined in the HAA. (Gov. Code, § 65589.5, subd. (h)(3).)

² A city can disapprove or condition approval in a manner that renders infeasible ("condition") an eligible housing development project *only* if it makes written findings based on a preponderance of evidence in the record that (1) the city has an adopted, substantially compliant housing element and has met its RHNA requirements; (2) the project

in substantial compliance [i.e., “self-certify”] but [that a jurisdiction] may provide reasoning why HCD should make a finding of substantial compliance” and “a jurisdiction is ‘in compliance [with Housing Element Law] as of the date of HCD’s letter finding the adopted element in substantial compliance.”³ Recently, trial courts in three separate cases confirmed HCD’s interpretations that a jurisdiction’s adopted housing element does not achieve substantial compliance until certified by HCD and that a “preliminary application” pursuant to SB 330 vests such noncompliance for the duration of the project entitlement process.⁴ As such, only HCD has authority to certify a city’s Housing Element as substantially compliant with Housing Element Law (and without such certification, a city’s Housing Element cannot be in substantial compliance with Housing Element Law).

Because the City did not have an adopted 6th RHNA Cycle Housing Element at the time the Project’s Preliminary Application was submitted⁵, and because the Project is a housing development project “for very low, low-, or moderate-income households,” the Project is subject to the Builder’s Remedy. Therefore, the City cannot deny or condition approval of the Project, notwithstanding any inconsistency of the Project with the zoning ordinance or General Plan land use designation of the Project Site, and is limited to the other four grounds listed in Government Code section 65589.5, subdivision (d), to disapprove or condition approval of the Project.

a. Consequences for Violation of the HAA

There are significant consequences for a city’s failure to comply with the HAA. Where a court finds a violation, it must issue an order requiring compliance within 60 days and can direct the city to approve the project if it finds the agency acted in bad faith. The court also must award the prevailing party its reasonable attorney fees and costs except in the “extraordinary circumstances” in which the court finds that awarding fees would not further the purposes of the statute. Further, if a city fails to comply with the HAA in 60 days of an order’s issuance, the court must impose a *minimum* fine on the agency of \$10,000 per housing unit in the housing development project as proposed on the date the application was deemed complete and can issue an order vacating the city’s action on the project, in which case the project is deemed approved. (Gov. Code, § 65589.5, subs. (k)–(l).)

would have a specific adverse impact on health or safety that cannot be mitigated without rendering the project unaffordable or infeasible; (3) the denial or conditioning of the project is required to comply with specific state or federal law; (4) the project site is zoned for agriculture or resource preservation and surrounded by land being used for those purposes; or (5) the project is inconsistent with both the city’s zoning ordinance and general plan land use designation and the city has an adopted, substantially compliant housing element. None of these findings apply to the Project or the Project Site.

³ See HCD Memorandum to Planning Directors and Interested Parties dated March 16, 2023, <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/memos/HousingElementComplianceMemo03162023.pdf>.

⁴ See *New Commune DTLA LLC v. City of Redondo Beach*, decided on February 8, 2024, *600 Foothill Owner, L.P. v. City of La Cañada Flintridge*, decided on March 4, 2024, and *Janet Jha v. City of Los Angeles*, decided on March 5, 2024.

⁵ See City’s Housing Element webpage, <https://www.saratoga.ca.us/499/2023-2031-Housing-Element> [first listed Housing Element adoption of March 20, 2024—i.e., after the Project’s Preliminary Application submittal].

2. SB 330 and Allowed Project Changes

Pursuant to SB 330, the Preliminary Application vested the ordinances, policies, and standards adopted and in effect when the Preliminary Application was submitted. (Gov. Code, § 65589.5, subd. (o)(1).)⁶ SB 330 provides that a new preliminary application is required for vesting *only* if, after submittal of a preliminary application, the applicant revises the project such that “the number of residential units or square footage of construction⁷ changes by 20 percent or more, exclusive of any increase resulting from the receipt of a density bonus, incentive, concession, waiver, or similar provision.” (Gov. Code, § 65941.1, subd. (c); see HCD Notice of Violation Letter to City of Beverly Hills, dated August 22, 2024⁸, p. 3 [“[o]ther changes to the application falling outside these circumstances do not void vested rights under the preliminary application”].)

At the time the Preliminary Application was submitted, the Project included four residential units (three single-family homes and one accessory dwelling unit (“ADU”)) and 7,570 square feet of construction. (See Preliminary Application.) The Project, as proposed by way of the enclosed Formal Application, consists of four residential units (three single-family homes and one ADU) and 7,882 square feet of construction. The revised Project constitutes a *less than* 20 percent change in both categories,⁹ and therefore Applicant maintains the vesting afforded to him under SB 330.

3. State Density Bonus Law

As discussed above, pursuant to Builder’s Remedy, the City cannot deny the Project based on inconsistency with the zoning ordinance or General Plan land use designation and is otherwise limited to four exclusive grounds to disapprove or condition approval of the Project. In addition, because at least 20 percent of dwelling units in the Project would be restricted to lower income households, the Project is eligible for a density bonus, two incentives/concessions, unlimited waivers or reductions of development standards, and specified parking standards pursuant to the State Density Bonus Law (“SDBL”). (See Gov. Code, § 65915, subds. (b)(1)(A), (d)(2)(B), (e), (f)(1), (p).) To the extent the City takes the position that the Project is subject to certain objective requirements notwithstanding the Builder’s Remedy, the Applicant would invoke the benefits of SDBL. (See HCD Letter of Technical Assistance to Sonoma County, dated April 26, 2024¹⁰, p. 2 [expressly stating that a project can concurrently use SDBL and

⁶ Subject only to limited exceptions. (Gov. Code, § 65589.5, subds. (o)(2), (6), (7).) None of which are applicable here.

⁷ The term “square footage of construction” is defined in the statute as “building area, as defined by the California Building Standards Code (Title 24 of the California Code of Regulations).” (*Id.*)

⁸ Available at <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/beverly-hills-hau-1071-nov-082224.pdf>.

⁹ A 20 percent increase over 7,570 square feet is 9,084 square feet; and a 20 percent decrease is 6,056 square feet.

¹⁰ Available at <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/sonoma-co-hau-704-ta-042624.pdf>.

Builder's Remedy].) As provided in the Preliminary Application, Applicant reserves the right to use the benefits it is entitled to pursuant to SDBL as the Project Formal Application progresses.

4. City's Review is First Limited to Determining Completeness

As Applicant has timely submitted the Formal Application, the City now has "30 calendar days [to] determine in writing whether the [Formal Application] is complete." (Gov. Code, § 65943, subd. (a) [referenced in Gov. Code, § 65941.1, subd. (d)(2)].) Government Code section 65943, subdivision (a), further provides:

If the application is determined to be incomplete, the lead agency shall provide the applicant with an exhaustive list of items that were not complete. *That list shall be limited to those items actually required on the lead agency's submittal requirement checklist.* In any subsequent review of the application determined to be incomplete, the [City] shall not request the applicant to provide any new information that was not stated in the initial list of items that were not complete.

(*Id.*, emphasis added.)

Accordingly, the City's review of the Formal Application at this time is limited to determining whether the Formal Application includes those items listed on the City's submittal requirement checklist (i.e., whether the Formal Application is "complete"). Review related to matters of consistency with "applicable, objective" requirements is subject to a separate process and timeline pursuant to the HAA. (Gov. Code, § 65589.5, subd. (j)(2).) To the extent the City elects to include information regarding such consistency determination in its review at this time, the City must clearly distinguish that information from any information required for, and the City's determination of, completeness of the Formal Application; otherwise, the City would be in violation of the Permit Streamlining Act (Gov. Code, § 65920 *et seq.*) and likely the HAA. (See HCD Letter of Technical Assistance to City of Gilroy, dated July 23, 2024¹¹, pp. 1–2 ["[w]hen a local jurisdiction improperly characterizes comments as incomplete items, the jurisdiction impermissibly raises the bar to achieving a complete application, in violation of the PSA"].)

5. Conclusion

Applicant looks forward to working cooperatively with the City to provide much needed housing, including affordable housing, to the community pursuant to critical state laws that are

¹¹ Available at <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/gilroy-ta-hau856-072324.pdf>.

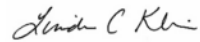
September 12, 2024

Page 5

designed to facilitate housing production. We would be happy to discuss the Project or the Formal Application with you at any time.

Sincerely,

Cox, Castle & Nicholson LLP

A handwritten signature in cursive script, appearing to read "Linda C. Klein".

Linda C. Klein

Cc: Kyle Rathbone, Assistant Planner, krathbone@saratoga.ca.us
Richard S. Taylor, Esq., City Attorney, RTaylor@smwlaw.com
Eric Cohn, Esq.