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Mayor Bobbie Singh-Allen
City of Elk Grove
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RE: DISAPPROVAL OF OAK ROSE APARTMENTS

Dear Mayor Singh-Allen:

We write regarding the City Council of Elk Grove's July 27, 2022 denial of the Oak Rose Apartments (the Project), a proposed supportive housing project in the City's Old Town Special Planning Area (the OTSPA). The proposed project would have added 66 units of supportive housing for lower-income households at risk of homelessness, in a jurisdiction in dire need of low-income housing opportunities. The Council denied the Project on the basis that it did not meet the city's objective zoning standards and was therefore ineligible for Senate Bill (SB) 35 ministerial review.

In response to the City Council's action, the California Department of Housing and Community Development (HCD) issued a Notice of Violation finding the City in violation of SB 35 (section 65913.4 of the Government Code), the Housing Accountability Act (the HAA), the Nondiscrimination in Land Use Law (Section 65008), the Affirmatively Furthering Fair Housing Statute (the AFFH Statute), and the Housing Element Law. The City responded to HCD's Notice of Violation on November 10, 2022.

Our office has reviewed the Notice of Violation and the City's November 10 response letter (the Letter). We agree with HCD's conclusion that the City's denial of the Project violated state law. We urge the City to reconsider and take prompt action to conform with state law.

I. THE GROUND FLOOR USE RESTRICTION IS NOT AN "OBJECTIVE STANDARD" UNDER EITHER SB 35 OR THE HAA

SB 35 requires local governments to provide streamlined, ministerial (nondiscretionary) approval of projects that are consistent with objective zoning standards. (Gov. Code, § 65913.4,

subd. (a)(5).)[1] To qualify as an "objective standard" under SB 35, a local zoning policy must "involve *no* personal or subjective judgment by a public official." (*Ibid*., italics added.) That definition is also in the HAA. (Compare § 65913.4, subd. (a)(5) with § 65589.5, subd. (h)(8).) This requirement ensures that the application of local standards is predictable. (*California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 850.)

The City contends that the Project does not qualify for ministerial approval under SB 35 because it conflicts with the following use restriction from the OTSPA: "Buildings used for 2nd and 3rd floor residential must be used for pedestrian oriented commercial uses on the ground floor (i.e., retail, restaurant, or office)." (OTSPA at p. 13.) The City's arguments in the Letter rely on the assumption that this use restriction is an "objective standard" within the meaning of SB 35 and the HAA, but it is not because its application depends on the exercise of discretion. Indeed the City itself acknowledges that its OTSPA standards—including the ground floor use restriction—involve discretion, noting that the City "has a mechanism to deviate from development standards under the OTSPA for projects that meet the goals of the OTSPA." (Letter at p. 15.) That mechanism allows considering the compatibility of a project with community character, which demonstrates that the OTSPA use restriction is not objective. Because the HAA and SB 35 prohibit the application of a standard that involves *any* discretionary application, the City cannot rely on OTSPA use restriction as a basis to deny the Project.

II. SB 35 AND THE HAA REQUIRE THE CITY TO TREAT THE PROJECT AS CONSISTENT WITH THE USE RESTRICTION

A. The Use Restriction "Relates to" Housing Density Under SB 35

Even if the OTSPA use restriction were an "objective standard" within the meaning of SB 35, the City was still required to approve the project because the use restriction is "related to housing density" and the project is compliant with maximum allowed density.

Under SB 35, a "development shall be deemed consistent with the objective zoning standards *related to housing density*, as applicable, if the density proposed is compliant with the maximum density allowed within that land use designation, notwithstanding any specified maximum unit allocation that may result in fewer units of housing permitted." (§ 65913.4, subd. (a)(5), emphasis added.) The City argues that the OTSPA use restriction does not "relate to housing density" within the meaning of SB 35 because it does not numerically establish the allowable units onsite.

In arguing that the use restriction is not strictly a density standard, the City ignores the broad interpretation of the term "related to" under SB 35. Importantly, the phrase "related to" must be interpreted broadly here given SB 35's admonition that the statute "be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval

[1] All statutory references are to the Government Code unless otherwise noted.

and provision of, increased housing supply." (§ 65913.4, subd. (n).) More broadly under state law, the meaning of "related to" includes "both logical and causal connections." (*Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 5 Cal.4th 854, 873; see also *Chawanakee Unified School District v. County of Madera* (2011) 196 Cal.App.4th 1016, 1028 [distinguishing the broader term "related to" from the narrower term "on"].)

Here, the OTSPA use restriction can be reasonably read as requiring *some* ground floor commercial uses, but not *entirely* commercial uses. Requiring solely commercial uses on the ground floor of otherwise residential buildings (i.e., prohibiting ground floor residential units) restricts the Project's ability to supply housing at the density allowable under the applicable land use designation and the Density Bonus Law. Such a prohibition *directly regulates* housing density at the Project site, because it restricts the feasible development of new housing to a level below what the general plan, coupled with the Density Bonus Law, allow. And to the extent the use restriction actually prohibits ground floor residential units, it is unquestionably a "zoning standard related to housing density" in both logical and practical effect. Therefore, the Project is deemed consistent with the use restriction and thus subject to ministerial approval under SB 35. (*Id*., subd. (a)(5).)

B. The City Did Not Timely Determine That the Project Violated the Use Restriction Due to Its Inclusion of Ground Floor Residential Units

Further, even if the Project was inconsistent with the OTSPA use restriction, the City failed to timely notify the project proponent as required by SB 35.

To find proposed new housing inconsistent with SB 35's objective planning standards, a local government "must provide the development proponent written documentation of which standard or standards the development conflicts with, and an explanation for the reason or reasons the development conflicts with that standard or standards" within proscribed time periods. (*Id*., subd. (c)(1).) Local governments must "carefully explain any determination that a proposed development conflicts with" SB 35's objective planning standards. (*Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277, 318.) Here, the City was required to do so within 60 days of application submission. (See § 65913.4, subd. (c)(1)(A).)

The City provided a letter to the Project developer on April 15, 2022, which was within 60 days, but that letter failed to make a clear determination that the project conflicted with local zoning standards. Rather, it requested "more information to know if the Project will be consistent with the standards." (Letter at p. 4.) In particular, it requested more information about whether the Project would have a pedestrian-oriented commercial use on the ground floor. Staff's request for additional information was not a determination that the project conflicted with the use restriction, and certainly did not reflect a "careful explanation" of any such determination. . Because the City failed to determine in a timely and adequate manner that the Project conflicted with the use restriction , the Project was deemed to satisfy the standard. (§ 65913.4, subd. (c)(2).)

In fact, the City ultimately determined that the Project *did* have a pedestrian-oriented commercial use on the ground floor, obviating its denial. It denied the project on a basis—the

presence of residential units on the ground floor—that was never articulated in the April 15 determination letter. (See June 2 Planning Staff Report at p. 10.) Because that determination was not made until 90 days after the project submission, on June 2, 2022, it was an untimely basis for denial. This is exactly the shifting goalposts that the SB 35 determination deadline is meant to avoid.

For those reasons, the City was required to treat the Project as consistent with the use restriction.

III. THE CITY VIOLATED THE HOUSING ACCOUNTABILITY ACT BY ENFORCING THE USE RESTRICTION

Even if the use restriction was objective and the City timely asserted its application, the HAA requires more of local planning decisions than simply applying objective standards. When the general plan authorizes a certain maximum residential density, the HAA requires the zoning and development standards to facilitate development at that density in order to accommodate the jurisdiction's regional housing need.

The local government must apply objective standards "appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need …. However, the development standards, conditions, and policies shall be applied to facilitate and accommodate development at the density permitted on the site and proposed by the development." (§ 65589.5, subd. (f)(1); see also *California Renters*, *supra*, 68 Cal.App.5th at p. 850.) Here, the City's application of the use restriction to the Project is not consistent with meeting its fair share of the regional housing need. The City is in its second consecutive cycle of failing to meet its need for low- and very low-income households, and the Project would have provided 66 units of lower-income housing.

Similarly, under the HAA, the City could only enforce the use restriction in a manner "to facilitate and accommodate development at the density allowed on the site by the general plan and proposed by the proposed housing development project." (§ 65589.5, subd. (j)(4).) Here, the Project falls within the density allowable under the general plan. Any zoning standard that the City would enforce against the Project must facilitate development at that proposed density. Yet the City enforced the use restriction to prevent such development, in violation of the HAA.

IV. THE CITY VIOLATED FAIR HOUSING LAWS

In its Notice of Violation, HCD charged the City with violating two important fair housing laws: Section 65008 and the AFFH Statute. Both of these statutes prohibit the City from engaging in discriminatory land use practices that disproportionately harm lower-income households. The City's denial of the project based on the use restriction constituted a discriminatory land use practice.

A. The City Violated Section 65008

Local governments violate Section 65008 whenever a land use decision is based on discriminatory intent *or* has a discriminatory effect. Here, there is evidence of both. First, the City's dissimilar treatment of a market-rate housing development, the Elk Grove Railroad Courtyards Project, evidences discriminatory intent. As the City admits in the Letter, Railroad Courtyards "is a multifamily, market-rate project that is located within the OTSPA and contains ground floor residential units." (Letter at p. 14.) Despite the presence of ground floor residential units, the City found that Railroad Courtyards was consistent with planning standards, and completely avoided any discussion of the use restriction. (See May 5 Planning Staff Report for Railroad Courtyards at p. 3.)[2]

With the Project, however, the City reached a different conclusion. There, the City adopted a strict interpretation of the use restriction as outright prohibiting ground floor residential units. The City thus adopted two conflicting interpretations of the OTSPA use restriction for two similarly situated projects serving different populations. It applied a more permissive interpretation to approve a lower density market-rate project, and it applied a stricter interpretation to disapprove the Project, a higher density lower-income supportive housing project. That conduct is impermissible under Section 65008.

In addition, the City's denial of the Project has a discriminatory effect and no compelling purpose to override that effect. The City applied the use restriction to disapprove an application to develop low-income housing in a jurisdiction that badly needs it. The residents who would benefit from the housing would be forced to look elsewhere for similar housing opportunities. That suffices to show a discriminatory effect. (See *Keith v. Volpe* (1988) 858 F.2d 467, 485 [holding that a City land use decision that adversely affect only low-income persons violated section 65008].)

The City's application of the use restriction was not necessary to achieve a legitimate policy goal, such as would override the discriminatory effect. To the contrary, on June 2, 2022, the Planning Commission, in adopting staff's findings, found that the Project would be consistent with the City policy of promoting "a greater concentration of high-density residential, office commercial or mixed-use sites" at "appropriate locations." (See June 2 Staff Report at p. 6.) Planning staff also found that the Project would be consistent with a City policy of providing "an increase of housing diversity and promot[ing] walkability with the Project in close proximity to other commercial businesses on Elk Grove Boulevard," and therefore "the proposed Project will be generally consistent with the General Plan." (*Ibid*.)

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[2] In fact, because the City relied on CEQA's exemption for infill housing development, it had to find consistency with local planning and zoning laws. (*Id*. at p. 9; see CEQA Guidelines, § 15332.)

The City's discriminatory intent and the discriminatory effect of its actions violated Section 65008.

B. The City Violated the AFFH Statute by Applying the Use Restriction

Under the AFFH Statute, the City must "administer its programs and activities"—all of them—"relating to housing and community development in a manner to affirmatively further fair housing," and the City may "take no action that is materially inconsistent with its obligation to affirmatively further fair housing." (§ 8899.50, subd. (b)(1).) The AFFH Statute thus applies to the local enforcement of zoning standards in the context of both SB 35 and the HAA.

The City takes the position that AFFH compliance depends on all of the City's actions related to housing. In making this argument, the City cites subdivision (d) of the AFFH Statute, which provides that in "selecting meaningful actions to affirmatively further fair housing, this section does not require a public agency to take, or prohibit a public agency from taking, one particular action." (*Id*., subd. (d).) That subdivision only speaks to the City's obligation to select meaningful actions to affirmatively further fair housing. It says nothing about the City's parallel obligation to avoid taking any action that is materially inconsistent with its mandatory duty to affirmatively further fair housing. (Id., subd. (b)(1).) Here, the City's action was contrary to AFFH because it applied the OTSPA use restriction in a subjective and discriminatory manner. For that reason, the City's legal argument that its Project-specific decision making is beyond the reach of the AFFH Statute is without merit.

V. HCD'S FINDINGS UNDER THE HOUSING ELEMENT LAW ARE ENTITLED TO GREAT WEIGHT

According to the City, a single "decision on one project cannot form the basis for a determination that the city is not implementing its Housing Element." (Letter at p. 17.) The City cites no authority for this proposition. Nor could it, as HCD may review "*any* action or failure to act" by the City that HCD "determines is inconsistent with the housing element or Section 65583." (§ 65589.5, subd. (i)(1)(A), italics added.) A single action can, in fact, bring the City out of substantial compliance with the Housing Element Law. (See *id*., subd. (i)(1)(B).) If HCD finds that *any action* violates the Housing Element Law, it may revoke its compliance findings until it determines that the locality has taken appropriate corrective action. (*Ibid*.)

The law vests HCD with the authority to review any action, including a project disapproval, for noncompliance with the Housing Element Law. Here, HCD's review found that the City's actions regarding the Project violated the Housing Element Law. The City should give great weight to that determination and review its actions in light of HCD's findings.

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We urge the City to reconsider the Project in light of HCD's guidance and the legal analysis set forth in this letter. If the City does not make efforts to remediate its actions within 30 days, this Office is ready to enforce California's housing laws in court. Please feel free to contact me to discuss this matter.

Sincerely,

MATTHEW T. STRUHAR
Deputy Attorney General

For ROB BONTA
Attorney General

Cc: Elk Grove City Council
Jonathan P. Hobbs, City Attorney
Lauren Langer, Best Best & Krieger
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