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October 8, 2020

VIA E-MAIL

Marcia Jensen, Mayor
And Members of the Town Council
Town of Los Gatos
110 E. Main Street
Los Gatos, CA 95030
council@losgatos.ca.gov

Re: Los Gatos North Forty; Request for Modification to an Existing Architecture and Site Application Approval (S-13-090)
Appeal to City Council; Agendized for October 20, 2020

Dear Mayor Jensen and Members of the Council:

This letter is written on behalf of SummerHill Homes, the Applicant for the above-entitled modification. The Planning Commission denied the application. Its denial was in error, an abuse of discretion, and was not based upon substantial evidence in the record. It also violated the Housing Accountability Act (Govt. Code Sec. 65589.5, the "HAA"). We are very familiar with this Project, as we represented the Applicant in connection with the original denial, the Litigation, and the subsequent approval of the Project.

A short summary of the error of the Planning Commission is that they were properly advised by the Town Attorney that the Application had to be evaluated in accordance with objective standards of review, the definition of which was read to them, and that their discretion was circumscribed by State laws, including the Housing Accountability Act and the Housing Element Law. They were further advised that the Modification complied with all objective parking and other standards of the Town.

Mayor Marcia Jensen
October 8, 2020

The motion for denial was stated to be based upon an erroneous analysis of the parking requirements that had been prepared by one Commissioner. It was not based on the applicable City Zoning Code or any other applicable objective standards. As such the denial is not based on objective standards and is also not supported by substantial evidence in the record.

To explain more fully: we concur with the advice the Commission was given by the Town Attorney that the Housing Accountability Act does apply to the requested modification. There is no question that the HAA applies to the entire Phase 1 Project. In fact, in the Litigation, Judge Takaichi explicitly stated in his opinion that the Project was a “housing development project” within the scope of the HAA.

Because the Project is subject to the HAA, the Town is limited to using only objective criteria in its evaluation of Project applications. As Staff has advised the Commission in the past, Section 65589.5(j) requires that the Application can only be turned down for a violation of objective standards. A recent amendment to the HAA clarified that this requirement also applies to imposing “*any conditions that have the same effect or impact [as reducing density would have] on the ability of the project to provide housing.*” (Govt. Code Sec 65589.5(h)(7).)

That same amendment clarified the meaning of “objective” as follows:

Until January 1, 2025, “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 knowable by both the development applicant or proponent and the public official. (Govt. Code Sec 65589.5(h)(8).)

It is clear from the justification provided by SummerHill that they would incur millions of dollars of additional costs to build the underground parking level that is not required by Town Code. Imposing such an unnecessary expenditure would thus violate the HAA because it would have the same impact on the ability of the Project to provide housing as reducing the density of the Project would have.

Despite being advised of this clear requirement of the law by the Town Attorney, the Planning Commission seemed swayed by subjective opposition to the Application and denied the requested modification in violation of the HAA.

The maker of the motion to deny cited only one allegedly objective standard that he claimed was violated by the Application: he claimed based on his own, idiosyncratic analysis, that the Project was under-parked. However, as other Commissioners noted, and as Staff also stated, that analysis is incorrect. The Commissioner’s spreadsheet could not be relied upon by the Commission as constituting substantial evidence, as it was clearly wrong. Using it as the basis for a motion was thus arbitrary and capricious and an abuse of discretion.

Mayor Marcia Jensen
October 8, 2020

If there is one thing that has been clear throughout this process, it is that the underground parking level is not necessary to provide the amount of parking required by the Town Code. The maker of the motion also gave several other reasons for denial, acknowledging that they were not based on objective planning standards. As such, these simply reveal subjective antagonism to the Application, and must be disregarded.

We are sure that the Town is aware that the Legislature has amended the HAA several times since this project was initially approved. These amendments have all been aimed at further reducing a city's discretion in deciding on housing development project applications. In addition, the HAA now provides significantly increased exposure for a city that violates its strictures, including additional exposure to fines, penalties, and claims for damages, not to mention attorneys' fees.

If you need additional information or clarification, please feel free to contact the undersigned. We ask that this letter be made part of the official record of proceedings.

Very Truly Yours,

BERLINER COHEN



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ALF

cc: Robert Freed
Mike Keaney
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