

# Stan Hendryx



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Date: May 9, 2016

Kathleen Franco Simmons

City Clerk

603 All America Way

P.O. Box 3707

Sunnyvale, CA 94086-3707

Re: Special Development Permit and Vesting Tentative Map for 803-883 W. El Camino Real, File # 16-0233

Dear Kathleen:

On April 25, 2016, the Planning Commission approved the subject Special Development Permit and Vested Tentative Map subject to modified conditions of approval and adopted the mitigated negative declaration. I am writing pursuant to Sunnyvale Municipal Code 19.98.070 (SDP) and 18.20.090 (Tentative Map) to appeal this decision of the Planning Commission to the City Council. Pursuant to SMC 19.98.070(c) and 18.20.090(c), this action by the Planning Commission should be stayed and suspended pending a final determination of this appeal.

## BMR units in lot #11

The Planning Commission was given incorrect information by Staff at the hearing and consequently erred by excluding lot #11 from GC-7 BMR OWNERSHIP HOUSING COMPLIANCE. The housing units in lot #11 are ownership units, to be rented initially before being sold. GC-7 should be rewritten to include the requirement of five Below Market Rate residential units in lot #11 (12.5%) as required by SMC 19.67.040. By PS-3 BMR STANDARD PERMIT CONDITION, these five BMR units would be included in the Developer Agreement and the BMR Standard Conditions Form submitted to the Housing Division before submitting building permit applications for lot #11. State law requires the City to permit the developer to satisfy the BMR requirement by constructing rental housing at affordable monthly rents, as determined by City Council.

Condition GC-8 refers to this project as an "apartment project" that may be converted into some condominium units in the future. Lot #11 is not an apartment project. It is a condominium project from the time of filing of the Vesting Tentative Map:

A condominium map will be recorded for lot #11. Lot #11 is a condominium project as defined in section 4290 et seq. of the Civil Code of the State of California and filed pursuant to the Subdivision Map Act. The total number of condominium dwelling units shall be no more than 40 units.

(Vesting Tentative Map, Comment 22 CONDOMINIUM MAP)

The project description submitted by the applicant describes the project as a condominium project whose condos will be rented initially: "Pastoria consists of ... 28 residential rental units (condo-mapped) over the parking area, 12 residential rental units (condo-mapped) over the retail area, ..."



SMC 19.70.040:

“(a) A use permit or special development permit, issued under Chapter 19.88 or 19.90 shall be required prior to the conversion of apartments to community housing units, and *prior to the approval of any tentative or parcel map in furtherance of same*, in any zoning district.” (Italics added.)

The Vesting Tentative Map whose approval is sought is in furtherance of selling the lot #11 units as community housing units. Lot #11 becomes a condominium project when the Vesting Tentative Map is filed.

Civil Code 4125:

(a) A “condominium project” means a real property development consisting of condominiums.

(b) A condominium consists of an undivided interest in common in a portion of real property coupled with a *separate interest* in space called a unit, the boundaries of which are described on a recorded final map, parcel map, or *condominium plan* in sufficient detail to locate all boundaries thereof. ... (Italics added.)

The contents of a condominium plan are defined in Civil Code 4120, 4285. Condition PS-3 requires these contents, so PS-3 requires a condominium plan be submitted when building permits are issued for lot #11.

Civil Code 4185:

(a) “Separate interest” has the following meanings:...

(2) In a condominium project, “separate interest” means a *separately owned unit*, as specified in Section 4125. (Italics added.)

The housing units in lot #11 are ownership units, notwithstanding that the owner plans to rent them initially.

Clearly, the applicant intends to build lot #11 with 40 owned units, which they are asking to provide as rentals. As owned units, there is a 5-unit BMR requirement by SMC 19.67.040. Their ask to provide these owned units as rentals is governed by Government Code 65589.8:

A local government which adopts a requirement in its housing element that a housing development contain a fixed percentage of affordable housing units, shall permit a developer to *satisfy all or a portion of that requirement by constructing rental housing at affordable monthly rents*, as determined by the local government. (Italics added.)

SMC 19.67.040 specifies a fixed percentage of affordable housing units:

At least twelve and one-half percent of the total number of ownership housing units or single-family lots in a project shall be developed as BMR ownership housing...

The BMR unit rentals in lot #11 must be at affordable monthly rents as determined by City Council.

The Assistant City Attorney told the Planning Commission at the April 25, 2016, hearing that, since the owner intends to rent the lot #11 units initially, the City is precluded by a State court decision from requiring BMR rental rates in lot #11. Presumably, the Assistant City Attorney was referring to *Palmer/Sixth Street Properties v. the City of Los Angeles*, Court of Appeal of California, Second District. 175 Cal. App.4<sup>th</sup> 1396 (2009) “Palmer.” The Assistant City Attorney was incorrect. The so-called Palmer restriction on rental BMR does not apply to this project. The City can require BMR rentals in lot #11.



In the Palmer case, the Court of Appeal affirmed the decision of the superior court. Writing for the majority, Presiding Judge J. Suzukawa said, “The superior court concluded that, *as applied to Palmer’s proposed project*, the affordable housing ordinance conflicts with and is preempted by the vacancy decontrol provisions of the Costa-Hawkins Rental Housing Act (Civ. Code, § 1954.50 et seq.; the Costa-Hawkins Act or the Act), which allows residential landlords to set the initial rent levels at the commencement of a tenancy.” The court observed that “*the Costa-Hawkins Act does not apply when “[t]he owner has otherwise agreed by contract with a public entity [to build affordable housing] in consideration for a direct financial contribution or any other forms of assistance specified in Chapter 4.3 (commencing with Section 65915) of Division 1 of Title 7 of the Government Code”* (Civ. Code, § 1954.53, subd. (a)(2))...” (*Italics added.*) The Palmer restriction does not apply when Costa-Hawkins Act does not apply. Costa-Hawkins does not apply when the City provides certain forms of assistance, which appertains in this case.

Government Code 65915:

- (k) For the purposes of this chapter, concession or incentive means any of the following:
  - (2) Approval of mixed-use zoning in conjunction with the housing project if commercial, office, industrial, or other land uses will reduce the cost of the housing development and if the commercial, office, industrial, or other land uses are compatible with the housing project and the existing or planned development in the area where the proposed housing project will be located.

The existing zoning is C-2/ECR, which requires use permits for the proposed hotel and residential uses of this land, per SMC Table 19.20.030.9 Residential/Boarding/Lodging. According to the Vesting Tentative Map, Notes 6, 7, 8, the owner is requesting a change of land use from General Business to General Business, Low-medium Density Residential. They are also requesting a lot merger of lot #10 with the adjacent hotel lot, APN 165-01-044, implicitly changing the use of lot #10 to Lodging (hotel). Inclusion of the hotel and retail components is expected to reduce the cost of the housing development and increase the profitability of the project.

The owner is requesting assistance from the City in the form of approval of compatible mixed-use zoning in conjunction with the project. Therefore, the Costa-Hawkins Act does not apply to this case. The Palmer restriction does not apply. Lot #11 is a condominium project requiring five BMR units. The applicable State law is Government Code 65589.8, quoted above.

In exchange for granting the land use changes, lot merger and use permits, the City is entitled to consideration in the form of at least five BMR units in lot #11 per SMC, and should ask for relocating the bus pad as discussed below. The City should also ask that seven (12.5%) of the hotel rooms in block #10 be designated as market rate single room occupancy living facilities or residential hotels, in furtherance of the City’s housing quota. The City is required to permit the developer to rent the BMR units in lot #11 at affordable rates set by City Council. On information and belief, the owner intends to rent the lot #11 units for an indefinite period. That they intend to sell is noticed on the Vesting Tentative Map. In consideration of the delay in selling, the owner should agree to the terms and conditions of SMC 19.70 when notifying tenants of lot #11 of their plan to sell.

GC-8 calls for deferring BMR treatment of the units in lot #11 until they are sold. Deferring BMR treatment of these units is not in the public interest. BMR units are sorely needed now. This need is defined by ABAG’s Regional



Housing Needs Allocation and further identified by the California Department of Public Health. Sunnyvale is well behind meeting even its RHNA obligations, let alone the CDPH deficit estimates. BMR units in lot #11 and SRO rooms in lot #10 would go toward Sunnyvale's housing quotas. In view of the recent loss of 81 affordable units in the Twin Pines fire, our need is more urgent than ever. State law does not require deferral of the BMR provision in this case.

I appeal to City Council to delete GC-8 and modify GC-7 as described. This request is fully justified in view of the Palmer decision by the Civil Code, the Government Code, the Municipal Code and the distinctive attributes of the tentative map and the applicant's project description.

In the future, please be aware of the limitations of the Palmer decision. The City should be particularly vigilant to obtain BMR housing in exchange for providing certain concessions to a residential developer. Staff is well aware of Palmer and the limitation it poses for inclusionary rental housing. However, Staff does not seem so well informed about the basis for the decision, the Costa-Hawkins Act, and its applicability that allows for inclusionary rentals in certain situations such as this case. For an analysis by two noted real estate attorneys of the impact of the Palmer decision on inclusionary housing, please see <http://nonprofithousing.org/wp-content/uploads/CRA-Journal-Article-on-Palmer-February-2010.pdf>.

### **Relocation of the Bus Pad**

The VTA bus stop at the corner of El Camino Real and Pastoria has its bus pad in the right lane very close to the intersection. Consequently, when a bus stops there, traffic flow is impeded, often on both roads. Traffic backs up across the intersection on El Camino, can block through- and right-turn residential traffic on Pastoria. There have been many requests by members of the public, including at Council meetings and Civic Center Modernization workshops, to move the pad so busses pull off the roadway to stop. I made this request to the Planning Commission again last week. When queried by the Commissioners about repositioning the pad, Staff replied that the design is consistent with VTA policy and the matter was dropped. Staff's was unsatisfactory, nonresponsive. The VTA will not object. Many bus pads in Sunnyvale are located off the roadway, including Westbound El Camino Real at Mathilda, one block East of this intersection.

It is in the public interest that busses not block the traffic lane and it is within the City's power of eminent domain to compel the relocation of the bus pad off the roadway. Since the adjacent property is to be demolished and redeveloped, now is the ideal time to rectify this problem. The pad could be moved off the roadway about 250 feet to the West, to the crisscross walkway between the hotel and the residential/retail, with negligible impact on the applicant's plans. See the Preliminary Site Plan. That location would better serve the community and the applicant, being closer to the walkway, the hotel and retail. Integrating the bus stop with the walkway and the sidewalk there would beautify the area and improve walkability. Relocating the bus pad will better serve a modernized Civic Center, with increased traffic on Pastoria. If asked, the applicant might readily agree to the relocation as a condition of approval, but the City can require it in any case.

I appeal to City Council to make relocating the bus stop off the roadway a condition of approval. Deny and revise the Vested Tentative Map per SMC 18.20.070(f)(2) because the design or improvement of the proposed



subdivision is not consistent with the general plan or with the El Camino Real Specific Plan. The tentative map extends the bus pad in a manner that perpetuates a traffic nuisance. Have them relocate the bus pad.

### Applicable Policies

The following General Plan policies are supportive of this appeal to relocate the bus pad:

- LT-1.3 Promote integrated coordinated local land use and transportation planning
- LT-1.3a Participate in intergovernmental activities related to regional and subregional land use and transportation planning in order to advance the City's interests.
- LT-1.10 Support land use planning that complements the regional transportation system.
- LT-2.1a Prepare and update land use and transportation policies, design guidelines, regulations and engineering specifications to reflect community and neighborhood values.
- LT-4.2 Require new development to be compatible with the neighborhood, adjacent land uses, and the transportation system.
- LT-4.5 Support a roadway system that protects internal residential areas from City-wide and regional traffic.
- LT-4.10 Provide appropriate site access to commercial and office uses while preserving available road capacity.
- LT-5.1b Monitor the operation and performance of the street system by establishing a routine data collection program and by conducting special data collection as the need arises.
- LT-5.1c Require roadway and signal improvements for development projects to minimize decline of existing levels of service.
- LT-5.1d Study and implement physical and operational improvements to optimize roadway and intersection capacities.
- LT-5.2 Integrate the use of land and the transportation system.
- LT-5.2c Encourage mixed use developments that provide pedestrian scale and transit oriented services and amenities.
- LT-5.4f Manage on-street parking [of busses] to assure safe, efficient traffic flow.
- LT-5.16 When decisions on the configuration of roadway space are made, staff shall present options, including at a minimum an option that meets minimum safety-related design standards for motor vehicles, bicycles and pedestrians.
- LT-5.18 The City Council shall make the final decisions on roadway space reconfiguration when roadway reconfiguration will result in changes to existing accommodations.

### Parking is not a CEQA issue in this project

This project site is located in a transit priority area as defined in Public Resources Code Section 21099(a)(7):

“Transit priority area” means an area within one-half mile of a major transit stop that is existing or planned, ....

The entire El Camino Real Corridor is an existing transit priority area, one-half mile either side of the roadway, by virtue of the VTA 22/522 service, with major stops less than one mile apart.

Parking is irrelevant in CEQA at this site. PRC 21099(d)(1):



Aesthetic and parking impacts of a residential, mixed-use residential, or employment center project on an infill site within a transit priority area shall not be considered significant impacts on the environment.

It is inappropriate to discuss or analyze parking requirements for this project in a mitigated negative declaration, regardless of whether or not the parking meets local requirements. Doing so is distracting and provides documentary evidence that could potentially be used in a lawsuit. It is not in the interest of the City to include irrelevant material in any CEQA declaration or EIR.

The mitigated negative declaration for this project discusses and analyzes parking requirements, item 9 Transportation and Traffic – Parking, in two places, p. 9 and p.14. Item 9 should be deleted altogether. Alternatively, the commentary on this item should be revised to indicate only that the project is in a transit priority and that item 9 is therefore not applicable per PRC 21099(d)(1). The Detailed Project Description should be amended to state that the project is located in a transit priority area.

I appeal to the City Council to require that the mitigated negative declaration for this project be amended as described above before it is adopted.

Over the last 40 years, about 80% of lawsuits attempting to block development projects have used CEQA as their basis. In the future, please do not include irrelevant material in any CEQA document. Doing so invites litigation and needlessly provides documentary evidence. Only provide such material in documents where it is actually required.

### **Fee waiver**

I am making this appeal as a private citizen. I am a Sunnyvale resident, homeowner and registered voter. I live a block from El Camino Real and am a regular user of the intersection at Pastoria. I am affected and aggrieved by these matters as an active, civic-minded concerned citizen. I am neither the owner nor the applicant of the subject property and I have no financial interest in this project. I support the project, except for the items listed here, and find that it will make an important contribution to the city and to our housing stock, particularly if you adopt the changes I am requesting. I am making this appeal in the public interest as a public service to correct a decision of the Planning Commission that was made in light of erroneous information given to the Commissioners by City Staff at the hearing. I have not been paid to do this. I paid the City a fee of \$161 to file this appeal. Citizens should not be required to pay a fee to bring to such items to the attention of Council to have material errors of this kind corrected. The fee is really intended for the owner and applicant, usually to appeal some negative finding by the Planning Commission. The City form provided does not even include a place for a citizen appellant to identify himself or herself; there is just space for the owner and applicant. I suppose citizens do not appeal Planning Commission decisions very often. I appeal to the City Council to please waive the fee and refund my \$161.

Thank you for your attention to this matter.

Sincerely,

Stan Hendryx