



MEETING DATE: 09/01/16
ITEM NO. 4

DESK ITEM G

COUNCIL AGENDA REPORT

DATE: AUGUST 26, 2016

TO: MAYOR AND TOWN COUNCIL

FROM: LAUREL PREVETTI, TOWN MANAGER

SUBJECT: ARCHITECTURE AND SITE APPLICATION S-13-090 AND VESTING TENTATIVE MAP APPLICATION M-13-014. PROPERTY LOCATION: SOUTHERLY PORTION OF THE NORTH 40 SPECIFIC PLAN AREA, LARK AVENUE TO SOUTH OF NODDIN AVENUE. APPLICANT: GROSVENOR USA LIMITED. PROPERTY OWNERS: YUKI FARMS, ETPH LP, GROSVENOR USA LIMITED, SUMMERHILL N40 LLC, ELIZABETH K. DODSON, AND WILLIAM HIRSCHMAN.
CONSIDER A REQUEST FOR THE CONSTRUCTION OF A NEW MULTI-USE, MULTI-STORY DEVELOPMENT CONSISTING OF 320 RESIDENTIAL UNITS, WHICH INCLUDES 50 AFFORDABLE SENIOR UNITS; APPROXIMATELY 66,800 SQUARE FEET OF COMMERCIAL FLOOR AREA, WHICH INCLUDES A MARKET HALL; ON-SITE AND OFF-SITE IMPROVEMENTS; AND A VESTING TENTATIVE MAP. APNS: 424-07-024 THROUGH 027, 031 THROUGH 037, 070, 083 THROUGH 086, 090, AND 100.

REMARKS:

On August 16, 2016, the Council resumed its deliberations on the proposed applications, continued the matter to September 1, 2016, and directed staff to return with more information on the items listed below. Staff's responses are provided in italic font following the items.

- Have the density bonus units been replaced adequately under the law (legal opinion required)?

The Town Attorney's legal opinion on this matter was previously provided as follows:

PREPARED BY: JOEL PAULSON
Community Development Director

Reviewed by: N/A Assistant Town Manager _____ Town Attorney _____ Finance

REMARKS (Continued):

Government Section 65915(c)(3)(A) provides that an applicant "shall be ineligible for a density bonus or any other incentives or concessions " if the proposed development is eliminating units "occupied by lower or very low income households unless the proposed housing development replaces those units" with "at least the same number of units of equivalent size or type, or both, to be made available at affordable rent or affordable housing cost to, and occupied by, persons and families in the same or lower income category as those households in occupancy."

This provision in the density bonus statute requires that a project "replace" all rental housing that was occupied by very low and low income households in the past five years. If the project does not replace the housing with new housing available at the same income levels (very low or low), it is not eligible for a density bonus. The initial study found that there were 16 existing units on the North Forty that were to be demolished to permit Phase I to proceed. The applicants (Grosvenor and SummerHill) do not currently lease most of the units and do not have income information for most of the tenants, especially over the last five years. However, even if it is assumed that all of the existing units are or have been occupied by very low income households, the project proposes to provide 49 very low income units and therefore meets the statutory requirements to "replace" the units.

More importantly, the original project application was made in 2013. The statute specifically exempts applications made before January 1, 2015 from the replacement housing provision. Section 65915(c)(3)(C).

In addition, Staff has requested an opinion on this matter from outside legal counsel. The memorandum from outside counsel on this matter is set forth in Attachment 34.

- How does the density bonus apply as asked in public comment?

The Town Attorney's legal opinion on this matter was previously provided as follows:

Very low income seniors who will reside in the proposed affordable housing are "persons and families" with very low incomes and so are very low income households. "Persons" are single persons and unrelated persons who elect to live together as one household. "Families" are defined in our Town Code as one (1) or more persons who comprise a single household and who live together as a single housekeeping unit. All of the seniors who will live in the proposed housing will be "households" with very low incomes, and so the senior housing will be occupied by very low income households, and the Project is entitled to a density bonus for providing very low income housing. "Household" means all persons, related or unrelated, occupying a single housing unit.

REMARKS (Continued):

The definition of a "density bonus" is: "A density increase over the otherwise maximum allowable residential density as of the date of application by the applicant to the city." (Gov't Code §65915(.))

"Maximum allowable residential density" is defined as "[T]he density allowed under the zoning ordinance and land use element of the general plan, or, if a range of density is permitted, means the maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project. Where the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan, the general plan density shall prevail." (Gov't Code §65915(0)(2).) A density bonus is provided for a "housing development." (Gov't Code §§65915(a), (b)(I), (f).)

The definition of "housing development" contained in the density bonus statute states that: "For the purpose of calculating a density bonus, the residential units shall be on contiguous sites that are the subject of one development application, but do not have to be based upon individual subdivision maps or parcels." (Section 65915(i).)

Under these definitions, the base density over which the bonus is calculated is determined by the maximum density permitted by the land use element of the general and specific plan, which overrides any zoning limitations.

The Town's land use element of the general and specific plan, as amended by the Town Council on June 17, 2015, states that the maximum capacity of the North Forty site is 270 units. There are 17 existing units, so the Applicants could have claimed 253 units as the base density and proposed a project of 342 units with the maximum 35 percent density bonus. The proposed project with a base density of 237 units is smaller than allowed by state law, not larger.

The requested North Forty density bonus is for residential units located on contiguous sites that are the subject of one development application. Therefore the bonus has been calculated properly, for one development application. The fact that the single development application is submitted by more than one entity, who are together the "applicant," is irrelevant to calculating the density bonus.

In addition, Staff has requested an opinion on this matter from outside legal counsel. The memorandum from outside counsel on this matter is set forth in Attachment 34.

REMARKS (Continued):

- What are the Town's litigation risks and their ramifications?

A petition for a writ of mandate for violation of our Town Code, general or specific plan, or Subdivision Map Act must be filed within 90 days of the decision. These deadlines are called the statute of limitations for the action. A petition for a writ of mandate is litigated far more quickly than a typical civil case. No jury is involved, and the judge is the trier of fact and makes the legal determinations.

A hearing on a petition for a writ of mandate normally occurs within nine months to a year of the filing of the petition. Either side can appeal a decision of the trial court to the Court of Appeal. In the majority of the cases, the matter is heard "de novo," meaning the Court of Appeal will hear the matter as if there were not a decision by the trial court. How long an appeal takes depends upon the workload of the court, but normally the matter is heard in a year to two years of the filing of the notice of appeal. Unlike the right to review the decision of a trial court, review by the California Supreme Court of a Court of Appeal decision is entirely at the Supreme Court's discretion, after the filing of a petition for review. The Supreme Court's role is not to right any wrong done by the Court of Appeal, but rather to clarify the law. Therefore, a decision is more likely to be reviewed if the opinion of the Court of Appeal is published and involves important questions of law or conflicting court of appeal decisions.

Like snowflakes, no two cases are alike. The exact amount of attorney's fees and costs that the Town would expend defending its decision depends on a number of factors. In addition, attorneys' fees can be recovered under California law if a party prevails against the Town and the matter results in enforcement of an important right affecting the public interest, the action confers a significant public benefit, and the financial burden of private enforcement, compared to private gain, makes an award appropriate. On the other hand, if the Town prevails in litigation, it would not be entitled to recoup its legal fees and costs, except in very extraordinary circumstances, such as when a filing is clearly frivolous.

Based upon my experience with land use litigation, I estimate that the Town would expend \$300,000 to \$500,000 defending a decision by the Town. In addition if the Town does not prevail, it would be liable for the approximate same amount in attorney's fees to the other party. These amounts do not include any separate lawsuit defending alleged violations of the Town's Housing Element or for a claim for damages by the property owner. The costs to defend these lawsuits would increase the estimated litigation risk from \$1 million to \$ 3 million.

In addition to the above, the Town Attorney is again providing as Attachment 35 a paper prepared by Santa Barbara County Counsel entitled Summary of Housing Element Law and Litigation.

REMARKS (Continued):

- How does this application comport with our Regional Housing Needs Allocation (RHNA) requirements - do we need to supply more low income housing, what gets credited, and how does it get credited?

Approval of the proposed applications will not require the Town to supply additional low income housing. All of the units built will be credited as housing production in the income level categories that they are built. If approved, the Town will get credit for 49 very low units, one moderate unit, and 270 above moderate units.

- Contact the State to confirm the previously submitted RHNA numbers are accurate, determine if there is an error in the Specific Plan, and if the housing units do not add up, what would the ramifications be.

Staff contacted the State Department of Housing and Community Development who provided a letter that is included in this Desk Item as Attachment 36.

- Provide more information on economics recognizing three studies were done.

Three economic studies were completed as part of the Specific Plan process. Each one had a different purpose. A market study and business opportunities assessment was completed in August 2011 and is included in the Specific Plan in Appendix A at the following link:

<http://www.losgatosca.gov/DocumentCenter/View/15472>

The Environmental Impact Report, Appendix K contains economic and urban decay reports available at:

<http://www.losgatosca.gov/DocumentCenter/View/8900>

In response to questions regarding the downtown's economic competitiveness with respect to the North 40, an additional economic analysis was provided to the Town Council at their December 16, 2014 meeting as Attachment 41 and can be found at the following link:

http://losgatos.granicus.com/MetaViewer.php?view_id=5&clip_id=1328&meta_id=137740

As part of the application process and as required by the Specific Plan, the applicant, submitted an economic analysis of the proposed development to the Conceptual Development Advisory Committee (see Exhibit 9 of Attachment 1) which can be found in the following link:

https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/21350/Attachment_1_-_March_30_2016_Staff_Report_with_Exhibits_2-15_.pdf

PAGE 6

MAYOR AND TOWN COUNCIL

SUBJECT: N. 40 PHASE 1 DEVELOPMENT APPLICATIONS/S-13-090 and M-13-014

AUGUST 26, 2016

REMARKS (Continued):

In response to issues raised by the Planning Commission and its motion to recommend denial of the applications, the applicant also provided supplemental information (see Attachment 17, Exhibit F) and available at:

https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/21597/Attachment_17_-_Applicant_s_Response_to_the_Planning_Commission_recommendation_on_the_applications_received_August_5_2016.pdf

Attachment 32 contains a response from the applicant regarding the discussions at the August 16, 2016 Council meeting. Attachment 33 contains public comments received between 11:01 a.m. August 19, 2016 and 11:00 a.m. August 26, 2016.

Attachments (previously received under separate cover):

1. March 30, 2016 Planning Commission Staff Report (includes Exhibits 1-21)
2. March 30, 2016 Planning Commission Addendum (includes Exhibits 22-23)
3. March 30, 2016 Planning Commission Desk Item (includes Exhibits 24-25)
4. April 27, 2016 Planning Commission Staff Report (no exhibits for this report)
5. July 12, 2016 Special Planning Commission Staff Report (includes Exhibits 26-31)
6. July 12, 2016 Special Planning Commission Addendum (includes Exhibits 32-33)
7. July 12, 2016 Special Planning Commission Desk Item (includes Exhibits 34-35)
8. July 13, 2016 Planning Commission Desk Item (includes Exhibits 36-39)
9. July 12, 2016 Special Planning Commission Meeting Verbatim Minutes
10. July 13, 2016 Planning Commission Meeting Verbatim Minutes

Attachments (previously received with August 9, 2016 Staff Report):

11. Required Findings and Considerations
12. Draft Resolution to deny the applications
13. Draft Resolution to approve the applications (includes Exhibit A, Findings and Exhibit B, Conditions of Approval)
14. Public comments received between 11:01 a.m. July 13, 2016 and 11:00 a.m. August 4, 2016
15. Additional information from the applicant, received July 29, 2016 (11 pages)

Attachments (previously received with the Addendum Report):

16. Public comments received between 11:01 a.m. August 4, 2016 and 11:00 a.m. August 5, 2016
17. Applicant's response to the Planning Commission recommendation on the applications, received August 5, 2016
18. Updated Vesting Tentative Map Sheet 1.1

Attachments (previously received with Addendum B Report):

19. Public comments received between 11:01 a.m. August 5, 2016 and 11:00 a.m. August 8, 2016

PAGE 7

MAYOR AND TOWN COUNCIL

SUBJECT: N. 40 PHASE 1 DEVELOPMENT APPLICATIONS/S-13-090 and M-13-014

AUGUST 26, 2016

Attachments (Continued):

Attachments (previously received with the Desk Item Report):

20. Public comments received between 11:01 a.m. August 8, 2016 and 11:00 a.m. August 9, 2016
21. Applicant's response to the Town Council staff report, received August 8, 2016
22. Photos of high density projects
23. Revised Draft Resolution to approve the applications (includes Exhibit A, Findings and Exhibit B, Conditions of Approval)

Attachments (previously received with Desk Item B Report):

24. Public comments received between 11:01 a.m. August 9, 2016 and 11:00 a.m. August 11, 2016
25. Document referenced by Joseph Gemignani regarding survey results
26. Applicant's response to questions from the August 9, 2016 meeting

Attachments (previously received with Desk Item C Report):

27. Public comments received between 11:01 a.m. August 11, 2016 and 11:00 a.m. August 12, 2016

Attachments (previously received with Desk Item D Report):

28. Public comments received between 11:01 a.m. August 12, 2016 and 11:00 a.m. August 15, 2016
29. Letter from the applicant's attorney, received August 12, 2016

Attachment (previously received with Desk Item E Report):

30. Public comments received between 11:01 a.m. August 15, 2016 and 11:00 a.m. August 16, 2016

Attachment (previously received with Desk Item F Report):

31. Public comments received between 11:01 a.m. August 16, 2016 and 11:00 a.m. August 19, 2016

Attachments received with this Desk Item G Report:

32. Response to August 16, 2016 Council meeting from the applicant, received August 25, 2016 (includes Exhibits A-G)
33. Public comments received between 11:01 a.m. August 19, 2016 and 11:00 a.m. August 26, 2016
34. Memorandum from outside legal counsel Remy, Moose and Manley, dated August 26, 2016
35. Memorandum on Housing Element Law and Litigation
36. Letter from the Department of Housing and Community Development, dated August 25, 2016