



**TOWN OF LOS GATOS  
COUNCIL AGENDA REPORT**

MEETING DATE: 08/1/2017

ITEM NO: 16

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DATE: JULY 27, 2017

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.

THE PUBLIC HEARING IS BEING HELD PURSUANT TO A COURT ORDER DIRECTING THE TOWN COUNCIL TO SET ASIDE THE DENIAL OF THE NORTH FORTY DEVELOPMENT APPLICATIONS AND RECONSIDER THE APPLICATIONS UNDER THE PROVISIONS OF GOVERNMENT CODE §65589.5(J) KNOWN AS THE HOUSING ACCOUNTABILITY ACT.

PREPARED BY: ROBERT SCHULTZ  
Town Attorney

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Reviewed by: Town Manager, Assistant Town Manager, and Finance Director

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RECOMMENDATION:

It is recommended that the Town Council:

1. Adopt a resolution (Attachment 10) to set aside Resolution 2016-046 denying the Vesting Tentative Map and Architecture and Site applications; and
2. Adopt a resolution (Attachment 12) approving the Architecture and Site and Vesting Tentative Map applications.

REMARKS:

On July 24, 2017, the Council opened the public hearing; listened to the verbal staff report, applicant's presentation, public testimony, and applicant's rebuttal; closed the public testimony portion of the public hearing; and continued the matter to the August 1, 2017 meeting with direction to provide additional information.

Based upon the testimony, and information requested both at the meeting and thereafter, the following is the information requested, followed by staff responses in bold italic font:

1. Provide Attachment 32, which contains Exhibits B through G, from the Desk Item for the September 1, 2016 Council meeting.

***Attachment 13 contains the requested information.***

2. Provide the specific language from the Court decision regarding significant adverse impacts to health and safety standards and the date the application was deemed complete.

***The specific language from the Court decision states on page 3 that: The pertinent statute of the Housing Accountability Act ("HAA") is Government Code §65589.5 (j) which states:***

***"(j) When a proposed housing development project complies with applicable, objective general plan and zoning standards and criteria, including design review standards, in effect at the time that the housing development project's application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by substantial evidence on the record that both of the following conditions exists:***

***(1) The housing development project would have a specific, adverse impact upon the public health and safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies or conditions as they existed on the date the application was deemed complete.***

***(2) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density."***

***Government Code Section 65589.5 (j)(1) uses the date the application was deemed complete as the threshold for applicability. These applications were deemed complete on May 4, 2016. It is staff's position that the applications comply with all Town objectives, identified written public health or safety standards, policies, or conditions.***

3. Provide Chapter 2.6 of Government Code Section 65088 as referenced in Government Code Section 65589.5 (e) of the Housing Accountability Act (HAA) in relationship to the Congestion Management Plan.

***Attachment 14 contains the requested information.***

***Government Code Section 65088 - 65089.10 is a legislative scheme requiring Public Agencies to implement a Congestion Management Plan. The Town is part of Santa Clara County's established Congestion Management Program (CMP). The intent of the CMP legislation is to develop a comprehensive transportation improvement program among local jurisdictions that will reduce traffic congestion and improve land use decision-making and air quality. The EIR was prepared according to objective standards of the Town of Los Gatos and the Santa Clara Valley Transportation Authority (VTA), which is the congestion management agency for Santa Clara County that reviewed the requirements of the Congestion Management Plan in evaluating traffic impacts of the Specific plan.***

4. Does the Housing Accountability Act (Government Code Section 65589.5) have a legislative history that can be reviewed?

***The Housing Accountability Act (HAA) was passed in 1982 in recognition that "the lack of housing, including emergency shelter, is a critical statewide problem," and is known as "the anti-NIMBY law."***

**Attachment 15 is the legislative history of SB 167 that details the history and background of the Housing Accountability Act. SB 167 was approved by the California State Senate but has not been taken up by the California State Assembly. SB 167 would further strengthen the language in the HAA and take away local control.**

5. Provide thresholds regarding new scientific evidence given the HAA and whether or not that can be considered when looking at health hazards.

**The new evidence cannot be considered because the Town has not adopted any objective, identified written public health or safety standards, policies, or conditions that the project does not comply with, prior to the applications being deemed complete. If the Town had adopted objective policies or standards regarding air quality prior to the applications being deemed complete (i.e. a required setback from the freeway for residential uses) then the application would be required to comply with those requirements. Additionally, the certified EIR did not identify any significant, quantifiable, direct, and unavoidable impacts regarding health hazards.**

6. Provide information on the financial impact to the northern properties given the amount of residential in the proposed applications.

**The Court determined that there is no objective standard in the Specific Plan that requires a specific allocation requirement. Given this determination, the Town cannot use financial impact on the northern properties as reason for denial of the applications. The remaining property owners still have the ability to develop their properties.**

7. Provide a response regarding the objective criteria provided by Matthew Hudes.

**Staff has reviewed the document provided by Matthew Hudes and determined that the information that was provided does not contain any written quantifiable objective criteria that could be used for the denial of the proposed applications.**

8. Can the Town deny the project based upon the illustrative Tables in the Specific Plan which provide examples of desired housing product types or "unmet needs"?

**No. The Court determined that the Town's finding that the project is inconsistent with North 40 Specific Plan as it does not address unmet housing needs for seniors and Gen Y is a discretionary determination of a subjective policy. In addition, the Court determined the Town's finding that the project is inconsistent with the Residential Unit Size Mix is neither a requirement nor objective standard, but rather, an example how the North 40 site could assist the Town to meet affordable housing needs of the community.**

9. Can the Town deny the project because the 13.5 acres of 20 dwelling units per acre are not contiguous, or spread throughout the North 40 Plan Area?

**No. The Court determined that there is no specific allocation requirement in the Specific Plan. Given this determination, the Town cannot use this as reason for denial of the applications.**

10. Can the Town deny the project pursuant to Government Code section 65088(h) because of the new traffic pattern experienced by Los Gatos for the past two years, or because of the current Alberto Way, Winchester/Shelburne, and Highway 9/17 projects under consideration?

**CEQA establishes that the environment for which the Project is evaluated is established at the time of issuance of the Notice of Preparation (NOP) (Guidelines Section 15130(b)). The NOP for the North 40 Specific Plan was issued on February 13, 2013. All the above referenced projects were filed after the NOP was issued and after the applications were filed, and therefore, under both CEQA and the HAA, cannot be taken into consideration.**

**In addition, the Town Council certified a Program EIR for the North 40 Specific Plan on January 20, 2015 (Resolution 2015-002). An Initial Study was prepared to analyze the proposed uses and improvements associated with the Phase 1 project (Exhibit 3 of Attachment 1). Under CEQA, projects are required to mitigate the impacts of their proposed project, but are not required to mitigate conditions that arise following the date set by the baseline for traffic. The Initial Study concludes that the proposed development applications for Phase 1 comply with the environmental analysis completed with the certified EIR, and therefore, no additional environmental analysis is required for the proposed applications.**

**Finally, as a "by right" development under the Town's Housing Element, additional CEQA analysis is not required because the proposal (A&S) is not a "project" as defined by CEQA. In other words, the applicant voluntarily completed a new Initial Study beyond the State law requirements and the Town cannot require further CEQA analysis.**

11. Do General Plan polices apply to the Project?

**The objective standards in the Specific Plan and General Plan do apply.**

12. Why is the applicant entitled to a density bonus?

**The Density Bonus Law is a potentially powerful tool for developers and is designed to**

***implement "an important state policy to promote the construction of low-income housing and to remove impediments to the same." The purpose of the State Density Bonus Law is to encourage cities to offer bonuses and incentives to housing developers that will "contribute significantly to the economic feasibility of lower income housing in proposed housing developments (Government Code § 65917).***

***As recognized by California courts, "the Density Bonus Law reward[s] a developer who agrees to build a certain percentage of low income housing with the opportunity to build more residences than would otherwise be permitted by the applicable local regulations." Friends of Lagoon Valley v. City of Vacaville, 154 Cal. App.45 4th 807.***

***The proposed application includes 50 affordable senior rental units. Forty-nine units are proposed to be very low and extremely low income, and one manager unit would be moderate income. The proposed number of very low income units is in excess of 11 percent of the base number of units (237 units); therefore, the application qualifies for a Density Bonus of 35 percent (83 units). The Density Bonus Law requires that the Town not only grant the density bonus, but provide additional incentives, concessions, or waivers where needed, based on the percentage of low income housing units.***

13. Can the applications be denied because they fail to meet the objective height standard?

***No. A density bonus applicant may request a waiver or reduction of development standards that would have the effect of physically precluding the construction of the project at the densities permitted. "Development standard" means a site or construction condition, including, without limitation, local height, setback, floor area ratio, onsite open space, and parking area ratio requirements that would otherwise apply to residential development under local ordinances, general plan elements, Specific plans, charters, or other local condition, law, policy, resolution, or regulation.***

***There are very limited circumstances where the Town may deny a waiver. Under State Law, a waiver may only be denied if it would have a "specific, adverse impact upon health, safety, or the physical environment," or it would have an "adverse impact on any property listed in the California Register of Historical Resources." The Town does not have any other discretion or rationale for denying a requested waiver if they are necessary to accommodate additional density or concessions and incentives in the proposed project. In other words, if the project meets the requirements of the Density Bonus Law, the Town must grant development standard waiver requests to ensure the project as designed is not physically prevented from being developed. In Wollmer v. City of Berkeley the Court quoting the prohibition contained in section 65915(d)(I), warned, "Had the City failed to grant the waiver and variances, such action would have had 'the effect of physically precluding the construction of a development' meeting the criteria of the Density Bonus Law."***

***As stated in the March 2016 Staff Report, staff concluded that there are no specific, adverse impacts upon health, safety, or the physical environment from the granting of waivers for the definition of height related to grading and the maximum height being over 45 feet for the senior housing.***

14. Does the applicant have to provide replacement units for the housing units that will be demolished?

***The Density Bonus Law Government Code section 65915, subdivision (c)(3)(A), disqualifies an applicant for a density bonus or other incentives or concessions if existing rental units are present on the project property, or if the dwelling units have been vacated or demolished in the five-year period preceding the application, or were subject to rent restrictions or occupied by lower or very low income households, unless the proposed housing development replaces those units with affordable units of equivalent size or type, or both. Section 65915, subdivision (c)(3)(C), provides that subparagraph (A) does not apply to an applicant seeking a density bonus if the application was "submitted to, or processed by" a city before January 1, 2015.***

***The original application for the project was submitted on November 14, 2013. The original version of the project described in its initial application materials is substantially similar to that version that was eventually deemed complete in spring 2016, in that (i) the total number of units was similar, (ii) a similar portion of those units would be reserved for low-income seniors, and (iii) prior to 2015, requests for height exceptions similar to the current waiver requests were made.***

***It is staff's position that since the original application was filed before 2015, and was for a housing development that could not be approved without a density bonus and waiver of certain otherwise applicable development standards, that it is exempt from the replacement provisions.***

15. Is applicant entitled to a BMP waiver?

***The Town's Below Market Price (BMP) Guidelines require that affordable units be comparable in size, type, and finish (i.e., materials) to the market rate units and that the location of the affordable units be dispersed throughout the development to the extent feasible.***

***The applicants are proposing the following deviations from the BMP guidelines: aggregating all of the affordable housing into a single affordable senior housing component, providing smaller units than the market rate units, and offering rental units when the market rate units are for sale units. The applicant has provided a response and justification to the proposed deviations from these Guidelines***

***(Attachment 5). The BMP Guidelines allow for deviation and are therefore not objective standards. As such, these modifications cannot be grounds for the denial of the application.***

16. How does the input relating to health risks in the area of the freeway (500 - 1000 feet) affect the analysis under the Housing Accountability Act 65589.5?

***The new evidence does not affect the analysis because the Town has not adopted any objective, identified written public health or safety standards, policies, or conditions that the project does not comply with, prior to the applications being deemed complete. If the Town's General Plan or Specific plan had adopted objective policies or standards regarding air quality or other health risks prior to the applications being deemed complete (i.e. a required setback from the freeway for residential uses) then the application would be required to comply with those requirements. The EIR for the Specific Plan did not identify any significant, quantifiable, direct, and unavoidable health or safety impacts regarding health hazards.***

17. Can the Town temporarily delay development of the northern portion of the North 40 Specific Plan area?

***Under California Government Code section 65858, the Town could adopt an interim ordinance to temporarily prohibit development on the northern portion of the North 40 Specific Plan area. This type of ordinance is commonly referred to as a "moratorium ordinance." The purpose of a moratorium ordinance is to give the locality time to study the potential impact of particular activities and figure out whether and how these activities should be regulated.***

**CONCLUSION:**

As directed by the Court, the Town Council must rescind Resolution 2016-046 and reconsider the development applications consistent with State laws as discussed in the staff report for the July 24, 2017 meeting. The Town must make a decision on the applications before September 9, 2017 and file a Return of Writ to inform the Court of the Town Council decision.

If the Council denies the applications, the Council needs to identify specific facts that support findings that objective standards are not satisfied by the applications and/or that there are specific public health and safety impacts that can only be addressed by denying the applications.

If the Council decides to approve the applications, it must identify facts to support findings of consistency with the General Plan, Specific Plan, Housing Element, and other applicable laws; and adopt a resolution with conditions of approval. Modifications to conditions may be

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considered as long as they do not reduce the number of housing units or render the project infeasible to construct.

Staff will be available at the meeting to assist the Town Council in its deliberations and decisions.

NEXT STEPS:

- Council takes action on the applications;
- Council continues the matter to a special meeting on August 2, 2017;
- Staff prepares final resolution for Council approval on August 2, 2017;
- Town Attorney files a Return of Writ to inform the Court of the Town Council decision;
- Court determines whether the Town has complied with the Court decision.

COORDINATION:

This report was coordinated with the Town Attorney's Office, Town Manager's Office, Community Development Department, and Parks and Public Works Department.

Attachments previously received with July 20, 2017 Staff Report:

1. Draft Resolution to rescind Resolution 2016-046 (Exhibit A contains Resolution 2016-046)
2. Decision and Judgement
3. Housing Accountability Act
4. Recommended Conditions of Approval
5. Applicants' rationale for Density Bonus and BMP modifications
6. Public Comment received before 11:00 a.m. July 19, 2017

Attachments previously received with July 20, 2017 Addendum:

7. Public Comment received between 11:01 a.m. July 19, 2017 and 11:00 a.m. July 20, 2017

Attachments previously received with July 21, 2017 Addendum B:

8. Public Comment received between 11:01 a.m. July 20, 2017 and 11:00 a.m. July 21, 2017

Attachments previously received with July 24, 2017 Desk Item:

9. Public Comment received between 11:01 a.m. July 21, 2017 and 11:00 a.m. July 24, 2017

Attachments received with this Staff Report:

10. Revised Draft Resolution to rescind Resolution 2016-046 (Exhibit A contains Resolution 2016-046)
11. Draft Resolution to deny the applications

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12. Draft Resolution to approve the applications (includes Exhibit A, Findings and Exhibit B, Conditions of Approval)
13. Response to August 16, 2016 Council meeting from the applicant (Attachment 32 from Desk Item G for the 9/1/16 Council meeting), received August 25, 2016 (includes Exhibits A-G)
14. Chapter 2.6 of Government Code Section 65088
15. Legislative history of SB 167
16. Public Comment received between 11:01 a.m. July 24, 2017 and 11:00 a.m. July 27, 2017

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