



Ragghianti|Freitas LLP

Attorneys at Law

1101 Fifth Avenue, Suite 100
San Rafael, CA 94901-2903
telephone 415.453.9433
facsimile 415.453.8269
www.rflawllp.com

Peter M. Spoerl
peter@rflawllp.com

December 15, 2021

Via E-Mail Only

City Council
City of Novato
922 Machin Avenue
Novato, CA 94945

Re: Bahia River View Subdivision Application, File P2017-023

Honorable Mayor and Members of the City Council:

Our office represents Bahia Lands LLC, the applicant for a 5-lot residential subdivision of a nearly 7-acre site located on Bahia Drive. On March 8th, 2022, your Council will consider this application for much-needed housing. For the reasons set forth below, we urge you to approve the application.

EXECUTIVE SUMMARY

1. The City identified this site in the 2015-2023 Housing Element as having a development capacity of **eight units**.
2. The proposal is for only 5 units, which is a density of just **0.7 units per acre**.
3. This application can only be denied if certain very specific adverse effects on public health and safety are found to be present or there is a conflict with objective standards. There are no such effects, and the subdivision is fully compliant with the City's code.
4. Since the Planning Commission hearing on this matter, the applicant has voluntarily decided to limit the height of any future homes to **18-feet above existing grade**.
5. Each and every future home on this property will be subject to individual design review.



Project Overview

The project will be thoroughly presented in the staff report for the March 8th hearing, so the following represents only a brief summary. The application is for a five-lot subdivision of a 6.87-acre lot, with resulting lots ranging from .36 to 4.11 acres in size. The application is for the subdivision and lot creation only; **future house proposals will each be subject to future design review approval.**

The site, fronting Bahia Drive, is already graded with development pads, and the future homes will require only minimal grading with very little alteration of terrain and existing topography. As confirmed by City staff multiple times throughout this lengthy process, the proposal is completely consistent with Novato's subdivision ordinance, the City's General Plan, and the zoning standards. The proposed rezoning, consistent with the R-1 designation of existing adjacent residential neighborhoods, is intended to ensure development compatibility, and to establish clear and consistent standards for the review of future design review applications so that they will be subject to the same development standards that apply to surrounding homes.

The project complies with all requirements of the City's Hillside and Ridgeline Protection Ordinance, Novato Municipal Code Chapter 19.26 ("the Hillside Ordinance"). If approved, this simple subdivision application provides opportunities for the orderly development of much-needed residential housing inventory that will still be subject to discretionary design review for individual house plans.

Procedural History

In September of 2019, the Design Review Commission ("DRC") held a public hearing to consider certain elements of the proposed lot design and site configuration, and voted to recommend denial of the subdivision to the Planning Commission. The minutes of the meeting reflect that many of the Commissioners were unclear as to the scope of their review authority, expressly citing concerns regarding house designs (which have not yet been submitted and will be the subject of future review by the DRC) and discussing numerous concerns (traffic safety, fire safety, view impacts of theoretical house designs that were not before them and potential impacts on wildlife) that are completely outside of the DRC's narrow purview, under Novato Municipal Code Chapters 2.11, 19.26 and



19.42. The DRC was only supposed to make advisory recommendations with respect to certain aspects of the subdivision's proposed site configuration and consistency with certain development design criteria under the Hillside Ordinance.

In August of last year, the City's Planning Commission considered the application, and in a closely contested and confusing vote that included a recommendation of approval on three of the four required entitlements, ended up failing to reach majority recommendation for approval in a 3-3-1 split.

The discussion at the Commission's August 9th hearing reflected disagreement among the Commissioners regarding the potential for obstruction of hillside views (not an objective standard), and some confusion about exhibits included in the application materials designed only to show average slope calculations. The Commissioners' discussions also revealed fundamental misunderstandings about the City's authority to deny an application for a modest housing development that is completely consistent with objective standards set forth under the City's General Plan and zoning ordinance.

Analysis

Our client's plan is a carefully considered housing development that complies with all applicable General Plan and zoning ordinance requirements. The site was specifically identified in the City's 2015-2023 Housing Element as having a development capacity of eight units. This application only seeks five.

Because the proposal is fully consistent with applicable, objective general plan, zoning, and subdivision standards and criteria, state law actually prevents the City from denying the application unless it can identify specific adverse effects on public health and safety. There are no such effects here.

As several recent cases and pieces of legislation have clarified, state housing legislation is interpreted broadly in favor of housing developments. The Legislature has made it increasingly clear that housing mandates are to be taken seriously, and that local agencies such as Novato and the courts should interpret them with a view to giving the fullest possible weight to the approval and construction of housing. Such an



interpretation did not occur at the DRC and Planning Commission hearings on this project, **despite staff reports repeatedly noting that the project should be approved.**

Nonetheless, our client has listened carefully to public input and concerns regarding the proposal, and has consistently updated and modified the application in order to address and accommodate any potential impacts to the adjacent residential neighborhoods. For the City Council's consideration, we therefore also wish to highlight both a clarification to the record, and a new voluntary project component. Specifically, it is hereby proposed that **the maximum height of future structures will be limited to 18 feet above grade.** This condition and graphical depiction is included in the updated application materials and should reassure neighbors that views of hills and ridgelines in the area will be preserved.

The City Promised the State that 8 Units could go here

The project site was specifically analyzed by the City some time ago as a part of its long-term planning efforts. To comply with state law requirements under the Regional Housing Needs Assessment ("RHNA") process, the City has prepared a parcel-specific inventory of sites that currently allow for housing. The inventory, set forth on Table 46 of the City's 2015-2023 Housing Element, provides an estimate of potential development capacity for these sites based on existing environmental constraints and/or uses. The inventory also analyzes site zoning, applicable development standards and their impact on projected development capacity (significantly, including the Hillside Ordinance) to identify specific parcels that are appropriately zoned, available and suitable to produce needed housing units. **The City's own analysis, based on its own GIS and zoning data, concludes that the project parcel has a "realistic capacity" of up to eight units.** As noted above, our client's application is for a subdivision resulting in **five** units, significantly below the capacity for the site that the City has identified in its own Housing Element.

The point here is that our client has submitted a development application that is, by the City's own calculations, below the site's capacity, and is certainly well below the potential number of units that could be approved taking advantage of State density bonus law. Under California Government Code 65915(o)(4), for purposes of calculating maximum allowable residential density, 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**. At 5 dwelling units per acre, an application satisfying minimum affordability requirements under state density bonus law could theoretically **include up to 35 or more units**. Our client would prefer the layout sought by this application,

The Housing Accountability Act Requires Project Approval

In 1982, in an effort to address the State's housing crisis, the Legislature enacted the Housing Accountability Act (Gov. Code § 65589.5 *et seq*)("the Act"), which significantly constrains the ability of local agencies to deny qualifying housing projects (both market rate and below market rate). The Act includes a number of specific limitations on local agencies' ability to disapprove applications for housing developments.

The Act generally requires cities to actually approve the housing they have planned for, unless they make certain specific findings that the proposed housing will cause specific public health or safety impacts. Under the Act, if a qualifying housing project "complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards," the local agency cannot deny the project or condition the project to be developed at a lower density unless it finds that the project would have specific, adverse impacts upon the public health or safety which cannot be mitigated except through denial of the project or development at a lower density.¹ A qualifying housing project is deemed to comply with such standards if there is "substantial evidence that would allow a reasonable person to conclude" that it complies.²

As staff has analyzed at length in its staff reports (with citations and detailed factual findings set forth in draft resolutions), the project complies in all respects with all applicable General Plan, zoning and subdivision standards, including subdivision design review. This analysis includes a detailed and reasonable analysis of the subdivision's compliance with staff's interpretation of the Hillside Ordinance. As staff notes in their report, City authorities contain two different and internally inconsistent

¹ Cal. Gov. Code § 65589.5(j)(1)

² Cal. Gov. Code § 65589.5(f)(4)



definition of “ridgeline,” one in the General Plan and one in the Municipal Code. Staff has demonstrated in great detail how the project site does not comprise a “ridgeline” for purposes of the Hillside Ordinance, and how the definition set forth in the Municipal Code, under Novato Municipal Code Section 19.60.020, is inherently **subjective** and impracticable since nearly every conceivable regulated property would include a viewing perspective from which a proposed structure would be silhouetted against the sky.

Courts interpreting the Act have clarified in recent rulings that the statute requires standards that “**involve no personal or subjective judgment by a public official** and [are] 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.”³ Staff has established, in other words, that the application complies in all respects with all **objective** City General plan and zoning standards. If the City proposes to deny this application, it is required under law to make a finding of a specific, adverse impact upon the public health or safety that cannot be mitigated through other means.⁴ There is simply nothing in the administrative record of the City’s consideration of the application to date that would support such a finding.

The State Office of Housing and Community Development (“HCD”) and the newly created Housing Accountability Unit are expressly authorized to review any action, or failure to act, by a local government that HCD determines is inconsistent with an adopted housing element or Housing Element Law. Denial of this application will not withstand scrutiny under these enforcement authorities for the reasons stated above.

Slope Capacity Analysis

During the Planning Commission’s August 9th, 2021 hearing, there was considerable discussion and some apparent confusion regarding what was referred to repeatedly as the “building envelopes” depicted on Sheet TM4 of the originally submitted plan set. Commissioners expressed concern that the outlines labeled as “proposed building

³ California Renter’s Legal Advocacy and Education Fund v. City of San Mateo, (2021) 68 Cal.App. 5th 820, 840 (citing to Section 65589.5 subd. (h)(8) of the Act)

⁴ Honchariw v. County of Stanislaus, (2011) 200 Cal.App. 4th 1066,1078-80.



envelopes” were misleading as to the actual likely placement and “buildability” of future structures on the property. As staff explained at length during the hearing, the outlines on the Tentative Subdivision Map are intended not to depict a “building envelope” in the sense of an actual perimeter or boundary of constructable area, but instead were included to visually demonstrate that according to the City’s own GIS data, there exists sufficient area on the site to accommodate a lot that complies with the requirement that lots not exceed 25% grade in average slope.⁵ Accordingly, these outlines are more properly considered as a sort of illustration as a proof of slope capacity.

We have relabeled this exhibit and segregated it from the Tentative Subdivision Map in an effort to avoid any more confusion on this point. As staff noted during the August 9th hearing, actual house placement will be proposed in conjunction with future design review submission and will be driven by individual analyses and in accordance with applicable site development regulations under the Hillside Ordinance and other applicable Novato Municipal and Building codes, factoring in grading requirements, landscaping requirements, driveway configurations, and other considerations.

Voluntary Height Limit

We agree with staff’s conclusions that the length of the project site does not comprise a “hillside” for purposes of application of the Hillside Ordinance, and that the project and proposed lots are consistent with its development standards. Nonetheless, our client is sensitive to neighborhood concerns regarding the potential impacts of future house and design review submissions to views and view corridors. Accordingly, we have revised the submission packet to indicate our client’s willingness to agree to imposition of a condition of approval with the Tentative Subdivision Map limiting future homes to 18 feet in height above grade. This would represent a reduction in 12 feet from the otherwise applicable 30 foot height limit that would be permitted under the proposed rezoning to the R-1 zoning classification. This is a significant concession in recognition of site sensitivity and neighborhood concerns about view impacts.

⁵ Novato Municipal Code 19.26.050 (g)(4)



Conclusion

For the reasons set forth above, we urge the City Council to approve this application. Under the Act and other applicable state law regarding housing developments, the City simply has no lawful basis to deny this objectively standard-compliant application.

With the additional voluntary concessions and clarifications to the record offered in the updated application, this proposal offers a thoughtful and visually sensitive site plan that complies in all respects with the City's General Plan and zoning ordinance and will provide much needed housing consistent with site specific objectives identified in the City's own Housing Element.

We trust that the City Council will review this application with fresh eyes and approve this thoughtful housing development, which represents over seven years of careful planning and neighborhood outreach and compromise.

Thank you.

Very Truly Yours,

A handwritten signature in black ink, appearing to read 'Peter M. Spoerl', written in a cursive style.

Peter M. Spoerl

CC: Client
Jessica Smith, Polsky Perlstein Architects
Riley F. Hurd III, Esq.