



October 3, 2023

By E-Mail

Hon. Mayor Kate Colin
Members of the City Council
City of San Rafael
c/o City Clerk, city.clerk@cityofsanrafael.org
1400 Fifth Avenue, Room 209
San Rafael, CA 94901

Cc: Alicia Giudice, Community Development Director
(community.development@cityofsanrafael.org)
Cc: Robert Epstein, City Attorney (rob.epstein@cityofsanrafael.org)

Re: Applicability of the 'Builder's Remedy' regarding the five SB 330 Preliminary Applications for residential development submitted to the City of San Rafael by Dominican Valley LLC for the property at Magnolia Avenue at Deer Park Avenue in San Rafael (APN 015-163-03).

Dear Mayor Colin and Members of the City Council,

We are writing to correct misstatements of facts and mischaracterizations of our September 8, 2023 letter, regarding the development proposals submitted by Dominican Valley LLC, as described in the September 18, 2023 Marin IJ article by Richard Halstead, "[San Rafael Group Challenges 'Builder's Remedy' Housing Plan.](#)" (Copy attached) which we feel raise confusion about applicable laws that need to be clarified.

As you know, our September 8th letter presented our concerns about the processing of the five SB 330 Preliminary Application development proposals submitted by Dominican Valley LLC. However, in that letter, we did not comment on the 'builder's remedy.' We feel obligated to reach out to you as our elected officials because the City's responses noted in that article suggest that City officials may also share some misunderstandings about the Housing Accountability Act and when the 'builder's remedy' is applicable.

Perhaps the most concerning statements made in the Marin IJ article are in its final, summary paragraph, which states,

“While builder's remedy projects are not subject to denial by local elected officials, they are required to comply with the California Environmental Quality Act. Some legal experts, however, have questioned whether a jurisdiction could legally deny a builder's remedy project based on the information reported in a CEQA review.”

Both of these statements contradict state housing statutes and The Housing Accountability Act, in particular. (The "HAA") In truth, there are several reasons the City can deny the Dominican

Valley LLC project proposals claiming the ‘builder’s remedy’ and credible legal experts have not “questioned whether a jurisdiction could legally deny a builder’s remedy project based on the information reported in a CEQA review.” (Note: No Appellate Court has addressed this issue, to date.)

Let’s begin with the claim that “builder’s remedy’ projects are not subject to denial by local elected officials.”

In addition to failing to meet the requirements for low and moderate-income housing noted by the City’s responses to the Dominican Valley LLC SB 330 Preliminary Applications, there are other reasons for denial of the ‘builder’s remedy’ that apply in this instance.

According to Section 65589.5 (d) of the Housing Accountability Act,

“65589.5 (d) A local agency shall not disapprove a housing development project, including farmworker housing as defined in subdivision (d) of Section 50199.50 of the Health and Safety Code, for very low, low-, or moderate-income households, or an emergency shelter, or condition approval in a manner that renders the project infeasible for development for the use of very low, low-, or moderate-income households, or an emergency shelter, including through the use of design review standards, *unless it makes written findings, based upon a preponderance of evidence in the record, as to one of the following:*” [Emphasis added]

BASIS OF DENIAL #1:

THE DEVELOPMENT PROPOSAL CONSTITUTES A THREAT TO PUBLIC HEALTH AND SAFETY

The Builder’s Remedy can be denied under Section 65589.5 (d)(2), which states that a project can be denied or conditioned if it has an adverse impact on public health and safety. At this time, nothing constitutes a greater adverse impact on public health and safety than the threat of wildfires in very high fire hazard areas in California. This threat is so severe that in today’s market, any homes built in any areas designated as very high fire severity zones will pay significantly higher insurance rates or be unable to qualify for homeowner’s insurance at all.

Section 65589.5 (d)(2) states that a project can be denied if,

“65589.5 (d)(2): The development project or emergency shelter as proposed would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible.

“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.” [Emphasis added]

The intent of the law here is clear. It is even repeated multiple times in the regulations (See Section 65589.5(j)(1)(A).) We, again, point you to the San Rafael Code Wildlands Urban Interface (“WUI) designation given to the Dominican Valley LLC property, and the ordinance’s vegetation management, ground clearing, and setback requirements ([Chapter 4.12. Wildland-Urban Interface – Vegetation Management Standards](#) of the San Rafael Fire Code), as authorized and provided for under *California Government Code, Section 51179*, which modifies the determinations under Section 51178.

As noted in our September 8th letter, the San Rafael Code describes the WUI as **“a designation of a very high fire severity zone** as provided in Government Code Section 51179” and requires developers **“to create defensible space around structures** that will minimize the spread of fires from wildlands to structures, from structures to wildlands, and from structures to structures.” (i.e., ground clearing/ground hardening)

“Defensible space” is defined in the Code as an

“area **one hundred feet (100’) around a structure** where vegetation management has been conducted to reduce the potential for transfer of fire between the structure and the adjacent wildland, the adjacent wildland and the structure, or from structure to structure.” [Emphasis added]

The very existence of the Wildlands-Urban Interface section in the San Rafael Code constitutes a memorialized “finding” by the City that enforcement of vegetation management and structure’s setback provisions are necessary to protect the health and safety of the community; meaning that any failure to do so – as all of the Dominican Valley LLC proposals require -- would constitute a threat to that health and safety.

BASIS OF DENIAL #2:

THE DEVELOPMENT PROPOSAL VIOLATES STATE AND FEDERAL LAW

Section 65589.5 (d)(3) states that a project can be denied if,

“65589.5 (d)(3): The denial of the project or imposition of conditions is required in order to comply with specific state or federal law, and there is no feasible method to comply without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible.” [Emphasis added]

As we noted in detail, in our letter of September 8, 2023, all of the Dominican Valley LLC development proposals violate state and federal law about “waters of the state” and the wetlands permitting provisions of the Clean Water Act. To qualify for the ‘builder’s remedy’ development

proposals *cannot violate any state or federal law* and the requirements of those laws are not subject to waivers, concessions, or local variances.

The subject property is traversed by no less than six “Riverine” Wetlands/streams and tributaries, a designation that is subject to both federal and state regulations in addition to the San Rafael Zoning Code setback requirements.

The Dominican Valley LLC development proposals appear to violate the riverine wetlands protections noted in the U.S. Fish & Wildlife Service *National Wetlands Inventory Map*, the California ECO/Atlas *of the California Aquatic Resource Inventory*, the restrictions found in the State [Wetland and Riparian Area Monitoring Plan](#) (WRAMP) and the California [Wetland and Riparian Area Protection Policy](#) (WRAPP), and the San Rafael Municipal Code’s streams setback/protection requirements.

BASIS OF DENIAL #3:

THE DEVELOPMENT PROPOSAL RESULTS IN SIGNIFICANT, ADVERSE, UNMITIGATED ENVIRONMENTAL IMPACTS UNDER CEQA

The authority of the California Environmental Quality Act – CEQA, in this instance, is uncontestable. In Section 65589.5 (e) of The Housing Accountability Act, it states,

“Section 65589.5 (e) Nothing in this section shall be construed to relieve the local agency from complying with the Congestion Management Program required by Chapter 2.6 (commencing with Section 65088) of Division 1 of Title 7 or the California Coastal Act (Division 20 (commencing with Section 30000) of the Public Resources Code).

“Neither shall *anything in this section* be construed to relieve the local agency from making one or more of the findings required pursuant to Section 21081 of the Public Resources Code or otherwise **complying with the *California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code)*”**
[Emphasis added]

Similarly, in addition to the numerous environmental assessment needs described in our letter of September 8, 2023, other provisions for an exemption from CEQA under the HAA are not met by the project proposals. For example, per **Section 65589.5 (h)(6)D(i)(I)(ib)**, an exempt project cannot be located in a “very high fire hazard zone.”

As such, the question of whether the Save Dominican Valley LLC development proposals are subject to CEQA assessment is most certainly, yes.

BASIS OF DENIAL #4:**THE CITY WAS IN “SUBSTANTIAL COMPLIANCE” WITH STATE HOUSING LAW AT THE TIME A DEVELOPMENT PROPOSAL IS SUBMITTED**

According to the “[Housing Element Review and Compliance Report](#)” on the Department of Housing and Community Development website, the City of San Rafael is presently in compliance with state housing law and has been since the date of the adoption of its Housing Element on May 15, 2023.

Therefore, as noted in the “CHRONOLOGY OF EVENTS,” below, the City of San Rafael was “substantially compliant” with state housing law at the time that Dominican Valley LLC submitted its five SB 330 Preliminary Application development proposals. And as such, the “builder’s remedy” does not apply.

According to Section 65589.5 (d)(5) of the Housing Accountability Act and project can be denied if,

“65589.5 (d)(5): The development project or emergency shelter is inconsistent with both the jurisdiction’s zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, and the jurisdiction has adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with this article.”
[Emphasis added]

The record shows that this was the case regarding the five project proposals submitted by Dominican Valley LLC.

The inadequacy of the City’s response to the developer’s demands.

On July 28, 2023, the Community Development Department responded to the five pre-application proposals submitted by the Applicant: Proposal A, submitted June 7, 2023; Proposal B, submitted June 8, 2023; Proposal C, submitted June 12, 2023; Proposal D, submitted June 13, 2023; and Proposal E, submitted June 22, 2023.

In 4 of the 5 proposals (Proposals B, C, D, E), the Applicant proposed proceeding under “Government Code section 65589.5(d) *et seq.*,” the “builder’s remedy.” In the City’s responses to each of those proposals, under “Deficiencies,” they only point out that 4 of the 5 proposals do not qualify for the builder’s remedy based on the required percentages of affordable/low-income units provided. However, as argued above, this response was grossly inadequate.

The City should have informed the developer that, based on the evidence in hand, at that time, (a) None of the pre-application proposals qualified for the ‘builder’s remedy’ for all of the reasons noted, above, and (b) None of the pre-application proposals qualified for the ‘builder’s remedy’ because the ‘builder’s remedy’ only applies if a city’s Housing Element is not

substantially compliant with state housing law at the time of the submission of an applicant's proposals.

The Chronology of Events, shown below, shows that the City of San Rafael was "substantially compliant" with state housing law as of May 15, 2023, when it formally adopted its Housing Element because the City's final version of the Housing Element was subsequently certified by the Department of Housing and Community Development (HCD), *with only minor changes that did not in any way impact the Applicant's proposals*. As such, at the time the Applicant submitted their proposals (beginning on June 7, 2023), the City of San Rafael *was* in fact in "substantial compliance" with state housing law.

The definition of "substantial compliance" is a "matter of law," not opinion

The determination of whether a city's Housing Element is or is not "substantially compliant" with state housing law is not delineated under state law and is not up to the City, HCD, or the developer. **It can only be decided by the courts.**

Even YIMBY Law, the staunchest opponent of local control of planning and zoning, admits that the determination of whether or not a Housing Element adopted by a city is "substantially compliant" with state housing law is a "matter of law." They state that **"only a court can ultimately decide whether a housing element "substantially complies."** (See *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1191.) [Emphasis added]

Whether or not HCD has certified a Housing Element and the date of that certification **are also not relevant facts in the court's determinations. The courts are free to disregard HCD's opinions and determinations.**

In sum, the City of San Rafael has been operating under a substantially compliant Housing Element since the date of its adoption, May 15, 2023, before Dominican Valley LLC submitted its preliminary project applications. **Therefore, the 'builder's remedy' cannot be applied to or enforced for any of the Dominican Valley LLC development proposals.**

CHRONOLOGY OF EVENTS:

The following chronology of events substantiates that the City of San Rafael was operating under a substantially compliant Housing Element at the time when the Dominican Valley LLC submitted its SB 330 Preliminary Applications for its 5 development proposals.

May 15, 2023

The City "adopts" its Housing Element, making its "finding" that it is "substantially compliant" with state housing law.

May 17, 2023 - Housing Element sent to HCD; May 18 HCD acknowledges receipt.

The City submits Housing Element to HCD for certification.

June 1, 2023

HCD requests *minor revisions* to the Housing Element, all of which the City accepts and *none of which impact* the applicant's subsequent proposals. Their Housing Element, which was adopted on May 15, 2023, was found to be "substantially compliant" with state housing law.

June 7, 2023

The final version of Housing Element is "published."

Developer begins to submit proposals, starting June 7, 8, 12, 13, and 22.

June 22, 2023

HCD notifies the City of San Rafael that it has "certified" the final version of the Housing Element.

CONCLUSIONS

Based on the facts and circumstances described herein, the City is clearly not subject to the 'builder's remedy' with respect to the Dominican Valley LLC development proposals.

We urge the City Council to take action before more of the public's time and taxpayer's money is wasted. In our opinion, time is of the essence because we have it from reliable sources that the developer intends to only rely on the City's very limited response to their SB 330 Preliminary Applications (that the only 'builder's remedy' deficiency was the lack of low-income affordable units) as guidance and barring that has a green light in crafting their final application.

We consider the City's failure to inform Dominican Valley LLC of the disqualification of its five proposals to qualify for the 'builder's remedy,' in their responses to the developer's SB 330 Preliminary Applications, a failure to represent the best interests of the community and to ensure the protection of the health and safety of the residents of San Rafael. It is of no benefit to the community for the City not to inform the developer of all of the requirements under Section 65589.5, now, instead of providing the developer with fallacious grounds to claim the builder's remedy or to allege similar entitlements in the future.

Respectfully submitted,

The Save Dominican Valley Steering Committee

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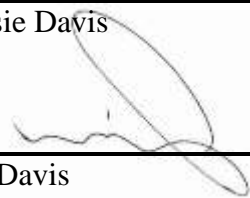
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