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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF CONTRA COSTA

CLAYTON FOR RESPONSIBLE DEVELOPMENT, an unincorporated association;

Petitioner

v.

CITY OF CLAYTON; CITY COUNCIL OF THE CITY OF CLAYTON; and DOES 1 to 20,

Respondents

WILLIAM JORDON; and DOES 21-40

Real Parties in Interest.

Case No. MSN20-0543

PETITIONER'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE

Date: October 22, 2020
Time: 10:00 am
Dept. 39

Judge: Hon. Edward Weil

Date Action Filed: April 9, 2020

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Codes and Statutes

City of Clayton Municipal Code

INTRODUCTION

Petitioner Clayton for Responsible Development petitions this Court for a Writ of Mandate, directed to Respondents City of Clayton and City Council of the City of Clayton ("City" or "Respondents"). Petitioner challenges Respondents' March 3, 2020, approval of The Olivia on Marsh Creek Project ("Project"). The Project is the construction of a 81-Unit Rental Housing Development. Petitioner contends that Respondents' approvals for the Project violate the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 *et seq.*, Density Bonus Law, Government Code, sections 65915; Clayton Municipal Code, sections 17.37, 7.44, 17.90 and 17.92.

The City and Real Party in Interest seek to hide behind the Density Bonus laws and the waivers and modification to avoid analyzing and addressing the Project's impacts to the surrounding area, including the adjacent properties. The City's reliance upon the in-fill exemption to avoid environmental review is not supported by substantial evidence as the Project is clearly inconsistent with the General Plan's density requirements and will have impacts to traffic/pedestrian safety. Moreover, the in-fill exemption does not apply as the facts demonstrate that the Project is not substantially surrounded by urban uses.

The Project also violates several provisions of the Clayton Municipal Code. For instance, the 41 % reduction in the off-street parking requirement will mean that the new residents will be forced to park off-site and cross busy road way to return home. Additionally, the City's findings regarding the Site Plan Review are not supported by substantial evidence and the bulk and size of the Project are incompatible with the existing structures. Finally, the City's determination regarding the maximum density bonus is inconsistent with the CMC, § 17.92 and Government Code, section 65915.

BACKGROUND FACTS

A. THE PROJECT AND PROJECT SITE

The Project is 3.02 acres comprised of three lots located at the southwest corner of High Street and Marsh Creek Road. (AR 1, 39, 3627.) The three lots are: 6170 High Street (APN 119-021-063) consisting to 1.11 acres; 6450 Marsh Creek Road (APN 119-021-055) consisting

of 0.97 acres; and 6490 Marsh Creek Road (APN 119-021-013) consisting of 0.93 acres. (AR 1, 3627.)

On September 6, 2017, Real Party in Interest filed an application with the City for The Olivia on Marsh Creek Project. (AR 604.) The application included a request for the granting of a density bonus requirement pursuant to the State's Density Bonus Law (Gov't Code, §§ 65915-65918) and the City's Affordable Housing Density Bonus Requirements Ordinance (Clayton Municipal Code ("CMC"), § 17.90. (AR 604.)

The Project is a multi-family residential development project at the comer of High Street and Marsh Creek Road on three separate parcels: 6170 High Street, 6450 Marsh Creek Road, and 6490 Marsh Creek Road. (AR 3626-3627.) The Project consists of rental units and includes seven affordable units designated for Very Low-Income households as defined by the U.S. Department of Housing and Urban Development. (AR 3625.)

B. APPROVAL OF THE PROJECT

On November 12, 2019, the City of Clayton Planning Commission held a public hearing on the application which included a request for planning entitlements and an exemption from CEQA for the Project. (AR 1794-1795, 2263-2271, 2272.) After an introduction of the Project, discussion and comments from the Planning Commission and members of the public, the Commission continued the matter to the December 10, 2019 Planning Commission meeting to allow staff to gather further information regarding questions raised at the November 12th hearing and to allow additional time for public comment. (AR 2271-2272; 2433-2435.)

On December 10, 2019, the Planning Commission approved a Resolution that The Olivia Project qualifies for an CEQA infill exemption under CEQA Guidelines section 15332 (Categorical Exemption Class 32, Infill Development Projects). (AR 41-42, 1516, 1701-1702 .) The Planning Commission also voted 2-2 on a motion to approve the Affordable Housing Density Bonus application, Site Plan Review Permit, and Tree Removal Permit, resulting in a "no decision" action. (AR 1517, 1736-1747.)

Kent Ipsen, Dan Hummer and Irina and Alexander filed three separate appeals challenging the Planning Commission's approval of a Resolution that the Project qualified for an infill

exemption under CEQA Guidelines section 15332. (AR 1035-1042, 1084-1087, 1089-1090.) Real Party in Interest William Jordan also filed an appeal of Planning Commission's failure to approve the entitlements for the Project. (AR 1044-1083.)

On February 4, 2020, the City Council held a hearing on the four appeals. (AR 601-603, 604, 888-893, 894.) The City Council then continued the hearing to March 3, 2020. (AR 892.) On March 3, 2020, the City Council adopted Resolution No. 06-2020 denying the appeals challenging the Planning Commission's approval of the of the CEQA infill exemption. (AR 26-32, 367-370, 557-550.) The Council also adopted Resolution No. 07-2020 granting the Real Parties' appeal and approving the Housing Density Bonus Application, Site Plan Review Permit, and Tree Removal Permit. (AR 5-25, 367-370, 558-560.)

In approving the Project the City found that the General Plan designation of the project site is Multifamily High Density (MHD) (20 units per acre), and the Specific Plan designation is Multi-Family High Density Residential (15.1-20 units per acre). (AR 7.) These designations are intended to facilitate. The City also found that due to the project incorporating a density bonus, pursuant to State law and the City's Affordable Housing Density Bonus Requirements Ordinance (CMC, § 17.90), it exceeds the 20 unit per acre residential density for the MHD land use designation and the density with the bonus units is 26.8 units per acre. (*Id.*) The state Density Bonus Law allows a development project to exceed the maximum density allowed under the General Plan when affordable housing units are included, and the granting of the density bonus shall not require, or be interpreted, in and of itself, to require a general plan amendment. Furthermore, the Density Bonus Law requires the City to approve the project with the additional density, provided that it meets all requirements of the law and does not result in specific adverse impacts as defined in Government Code section 65589.5(d)(2). The City found that the Project is allowed and is consistent with State law and the City's General Plan and local regulations (CMC, § 17.90 *et seq.*) at the density of 26.8 units per acre. (AR 7.)

The City found that the Project meets the requirements of the Affordable Housing Density Bonus Requirements. (CMC, § 17.90.) To this end, the City found that eleven % of the number of the number of 60 residential units allowed under the General Plan are set aside for households

meeting the U.S. Department of Housing and Urban Development's ("HUD") definition of Very Low Income. (AR 8.) Based upon that the City determines that the Project is entitled to a 35 % density bonus, equivalent to 21 additional units. (*Id.*)

On March 5, 2020, Respondents filed a Notice of Exemption with the County Clerk of Contra Costa County as provided for in Public Resources Code, section 21152. (AR 1-5.)

LEGAL ARGUMENT

A. THE CITY'S APPROVAL OF THE PROJECT VIOLATED THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

1. THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

"CEQA is a comprehensive scheme designed to provide long-term protection to the environment. [Citation.] In enacting CEQA, the Legislature declared its intention that all public agencies responsible for regulating activities affecting the environment give prime consideration to preventing environmental damage when carrying out their duties. [Citations.] CEQA is to be interpreted 'to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' [Citation.]" (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 112.)

In evaluating proposed projects, a public agency must evaluate whether a possibility exists that the project may have a significant environmental effect. (Pub. Resources Code, §§ 21100(a), 21151(a).) If so, then the agency must conduct an initial threshold study. (Pub. Resources Code, § 21080.1; CEQA Guidelines, § 15063.) If the initial study reveals that the project will not have any significant effect, then the agency may complete a negative declaration that describes the reasons supporting the determination. (CEQA Guidelines, §§ 15063; 15064(f)(3); 15070(a).) If the initial study identifies potentially significant effects but the applicant agrees to revisions in the project before the initial study and negative declaration are released for public review and the revisions reduce the impact to less than significant, then a mitigated negative declaration may be prepared. (CEQA Guidelines, §§ 15063(f)(2); 15070(b).) If the initial study determines that any aspect of the project may cause a significant effect on the environment, regardless of whether the overall effect of the project is adverse or beneficial, the

agency must prepare an EIR. (*Id.*; see *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d at p. 86; see also *Sundstrom v. County of Mendocino* (1982) 202 Cal.App.3d 296, 304-305.)

The EIR, with all its specificity and complexity, is the mechanism prescribed by CEQA to force informed decision-making and to expose the decision-making process to public scrutiny. (*Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 910; citing *No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d at p. 86.) The central purpose of an EIR is to identify the significant environmental effects of the proposed project, and to identify ways of avoiding or minimizing those effects through the imposition of feasible mitigation measures or the selection of feasible alternatives. (Pub. Resources Code, § 21002, 21002.1(a), 21061.) "An EIR provides the public and responsible government agencies with detailed information on the potential environmental consequences of an agency's proposed decision." (*Mountain Lion Foundation v. Fish & Game Com., supra,* 16 Cal.4th at p.113.) The EIR is "the heart of CEQA" and "an environmental alarm bell whose purpose is to alert the public and its responsible officials to environmental changes before they have reached the ecological point of no return." (*Laurel Heights Improvement Ass'n v. Regents of the Univ. of California ("Laurel Heights I")* (1988) 47 Cal.3d 376, 392.) The EIR is the "primary means" of ensuring that public agencies "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." (*Id.*, quoting Pub. Resources Code, § 21001(a).) The EIR is also a "document of accountability," intended "to demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its actions." (*Laurel Heights I, supra,* 47 Cal.3d at 392 (quoting *No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d at p. 86.)

2. THE STANDARD OF REVIEW UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Under CEQA the court must determine whether the agency has committed a prejudicial abuse of discretion. (Pub. Resources Code, § 21168.) An abuse of discretion is established if: 1) the agency's determination or decision is not supported by substantial evidence; or 2) the agency has failed to proceed in a manner required by law. (*Id.*) The court's role in reviewing

an agency's reliance on a categorical exemption is to determine whether substantial evidence in the record supports the agency's factual determination. (See *Banker's Hilcrest, Park West Community Preservation v. City of San Diego* (2006) 139 Cal.App.4th 249, 267; *Walters v. City of Redondo Beach* (2016) 1 Cal.App.5th 809, 817.) The administrative record must disclose substantial evidence of every element of the contended exemption. (*Id.*; citing *CalBeach Advocates v. City of Solano Beach* (2002) 103 Cal.App.4th 529, 536.) A claim that a project is categorically exempt will not upheld if the administrative record does not contain any evidence showing the project satisfies the criteria to qualify for an exemption. (*Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694, 706.

Substantial evidence does not include argument, speculation or unsubstantiated opinion. (Pub. Resources Code, § 21080(e)(2); CEQA Guidelines, § 15063(f)(5).) Rather "substantial evidence" means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (CEQA Guidelines, § 15384(a); see also Pub. Resources Code, § 21080(e)(1); *City of Redlands v. County of San Bernardino* (2002) 96 Cal.App.4th 398, 410.)

In determining whether a project meets the requirements of a categorical exemption, the exemptions must be narrowly construed. (*Dehne v. County of Santa Clara* (1981) 115 Cal.App.3d 827, 842.) Additionally, the categorical exemption should not be unreasonably expanded. (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205.)

3. SUBSTANTIAL EVIDENCE DOES NOT SUPPORT THE CITY'S DETERMINATION THAT THE PROJECT QUALIFIES FOR A CATEGORICAL EXEMPTION

In approving the Project, Respondents rely upon CEQA Guidelines, section 15332 otherwise known as the "infill exemption". (AR 1, 26-28.) The "infill exemption" under section 15332 consists of projects characterized as in-fill development that meet the following conditions:

> (a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.
> (b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.

(c) The project site has no value as habitat for endangered, rare or threatened species.
(d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.
(e) The site can be adequately served by all required utilities and public services.

As discussed below, the Project does not qualify for the in-fill exemption as the Project is inconsistent with the density limitations set forth in the City of Clayton's General Plan and zoning ordinances; is not substantially surrounded by urban uses; and would result in significant effects to traffic safety.

a. THE PROJECT IS INCONSISTENT WITH THE CITY OF CLAYTON'S GENERAL PLAN

The General Plan designation for the Project site is Multifamily High Density which is 20 unit per acre. (AR 7, 48.) The Specific Plan designation is Multifamily High Density Residential which is 15.1 to 20 units per acre. (AR 7, 48.) As approved, with the affordable housing density bonus, the Project contains 26.8 units per acre. (AR 5-7, 49.) The Project is inconsistent with the City of Clayton's General Plan because it would exceed maximum density rates established under the General Plan by 35 % while at the same time being inconsistent with the City of Clayton's Zoning Code because it would allow 41 % less onsite parking spaces than is otherwise required by law, and which would also authorize and sanction the removal of multiple large, established, healthy trees from the parcels. Moreover, the City readily acknowledges that the Project is inconsistent with the General Plan. (AR 48-49.)

The City and Real Parties rely upon the decision in *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, to assert that any modifications made to the City's standards under density bonus considerations are considered consistent with the CEQA infill exemption. (AR 1050 [citing *Wollmer v. City of Berkeley, supra,* 193 Cal.App.4th at 1347-1351]; AR 86, 2475, 158.) While, the *Wollmer* court discussed construction of CEQA and the housing density bonus law, *Wollmer* does not apply to this Project as the facts before the court in *Wollmer*. The density bonus ordinance adopted in Berkeley allowed for clustering of densities across multiple parcels within a single general plan area, provided that the average density rate among all of the parcels

in the designated cluster remained – in the aggregate – less than the applicable density rate specified in the applicable general plan. Accordingly, the *Wollmer* court determined that, as a matter of law, the proposed density of the specific project at issue in that case *was* consistent with Berkeley's unique General Plan, because although the density on some parcels exceeded the maximum density permitted under Berkeley's General Plan, in the aggregate, the density across the multiple parcels in the cluster used for doing the density analysis (as determined by Berkeley's planning staff) was less than the maximum density allowed under Berkeley's General Plan. (*Id.* at p. 1345.) Neither the City nor the Real Party has cited any provision within the City of Clayton Municipal Code similar to Berkeley's unique General Plan ordinance, which the *Wollmer* court discussed at length. Accordingly, the facts in the *Wollmer* are easily distinguished from the present action.

b. THE PROJECT IS INCONSISTENT WITH THE CITY OF CLAYTON'S ZONING CODE

The density for the Project also exceeds the maximum density that could legally be allowed under the City's Zoning Code. Under the Zoning Code, the maximum permissible density on the Project Site is 20 dwelling units per acre. (CMC, § 17.28.070 ["The maximum permissible density is defined by the overlying category(ies) designated in the General Plan."].) As approved, the Project consists of 27 dwelling units per acre, which exceeds the maximum allowable density under the Zoning Code. (See AR 1, 5-10.) The Bonus Density statutes do not alter the Zoning Code itself.

As discussed in more detail below, the on-site parking requirements for Project are not consistent with the Zoning Code. According to the Staff Report, based upon the number of units proposed for the Project (45 one bedroom units and 36 two bedroom units), the Zoning Code requires that the Project provide approximately 2.23 onsite parking spaces per unit (i.e. 2.0 parking spaces for each 1 bedroom unit and 2.5 parking spaces for each 2 bedroom unit) for a total of approximately 180 parking spaces. (*See* CMC, § 17.37.030A; *see infra.*) The Project contains only 106 onsite parking spaces, which is 41 % less than the Zoning Code requires. For this reason, the Project is inconsistent with the Zoning Code.

c. THE PROJECT WILL SIGNIFICANTLY IMPACT TRAFFIC SAFETY.

The record also demonstrates that the Project may have a significant effect on traffic and safety. The Infill Exemption Environmental Analysis prepared by Raney Planning & Management concluded that the Project would not result in any significant traffic effects. (AR 44.) Raney relied upon a May 8, 2017 Trip Generation Study prepared by Kimley Horn (AR 287-290) and reviewed by Abrams Associates in May 2018 (AR 292).

As part of the concessions requested under Government Code section 65915(d), the applicant requested a reduction in the number of parking spaces to 0.62 parking spaces per unit or 62 total parking spaces. (AR 834.91.) Kimley Horn also prepared a Parking Study dated June 10, 2019 (AR 834.85 – 834.92) and reviewed by Michael Baker International (AR 834.77 – 834.84.) Michael Baker's review resulted in the City determining that one parking space per dwelling unit plus a small amount of guest parking would be the minimum amount required. (AR 73.) The City concluded that 90 parking stalls would be required. (*Id.*) The applicant later submitted a revised site plan that increased the on-site parking from 86 to 106 stalls. (AR 72.) The 106 onsite parking spaces, however, is still 41% less than the Zoning Code requires, which is 180. (See CMC, §17.37.030A, Schedule 17.37.030A.)

While parking impacts alone may not be a CEQA issue, they can become CEQA issue if those impacts result in impacts to traffic safety, which is the case in this matter. As stated by Daniel Hummer, the analysis from Raney is incomplete as it does not adequately address impacts to traffic and safety from a lack of onsite parking. Given the number of units and bedrooms, there is the potential of up to 234 residents still in the working age range. (AR 1086.) If a conservative 75% of the 234 residents have a vehicle, this would mean that parking for 175 vehicles is necessary. (*Id.*) This coincides with the zoning code requirements of 180 parking stalls. With the need for over 175 parking spaces, the additional parking for the project will end being in the existing surrounding developments and downtown. (AR 1087.) This creates a major safety concern as residents of the new project will have to park offsite from the Project and will need to cross Marsh Creek Road which has a blind curve in order to get to their homes. (*Id.*) Traffic on Marsh Creek Road travels at excessive speeds of over 50 miles per

hour. (*Id.*) Given the design of the Project, residents and guests will have to park offsite and cross this busy section of Clayton day and night to get home. (*Id.*)

These comments and testimony demonstrate the flaws and inadequacy of the Raney analysis regarding traffic. Mr. Hummer's appeal and the testimony of others constitutes substantial evidence that the Raney analysis is flawed and that the Project may have impacts to traffic. While Mr. Hummers and the testimony of others may be lay testimony, such lay testimony constitutes substantial evidence given their personal knowledge of the surrounding area and traffic. "Statements of area residents who are not environmental experts may qualify as substantial evidence if they are based on relevant personal observations or involve nontechnical issues." (*Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 583; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1210-1211 (citing firsthand observations of citizens and business owners that the city was already littered with "empty warehouse type rundown buildings and that the project would result in more as part of the basis for concluding that the EIR must analyze the impacts from urban decay); *Ocean View Estates Homeowners Association v. Montecito Water District* (2004) 116 Cal.App.396, 402; *Mejia v. City of Los Angeles* (2005) 130 Cal.App.4th 322 (lay testimony on traffic and biological impacts); *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 932 (lay testimony on impacts to land use); *Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 172 (lay testimony on traffic impacts). Thus, substantial evidence supports a determination that the City failed to consider the impacts to safety associated with a lack of parking and that there potential impacts to safety

d. THE PROJECT IS NOT SUBSTANTIALLY SURROUNDED BY URBAN USES

For the infill exemption to apply, the development must occur within city limits on a project site of no more than five acres substantially surrounded by urban uses. (CEQA Guidelines, § 15332(b).) In denying the Petitioner's appeal, the City Council approved the in-fill exemption under CEQA Guidelines section 15322. (AR 27.) In approving the exemption, the City Council relied upon independent analysis of the Project's eligibility for the in-fill

exemption prepared by Raney Planning & Management, Inc. entitled "Infill Exemption Environmental Analysis for Clayton Senior Housing Project. (AR 26, 29-32.) Raney's analysis primarily addresses subdivisions (c) and (d) of section 15322. (See AR 29-32.) Nothing in Raney's analysis specifically addressed subdivision (b) regarding whether the project site is substantially surrounded by urban uses. (*Id.*) In addressing the historical resources exemption, Raney did state that the project site is located within an urbanized area of the City of Clayton and is surrounded by development. (AR 32.) Raney provided no further analysis discussion regarding whether the Project is substantially surrounded by urban uses. (AR 29-31.) Nothing in the City's Resolution denying the Petitioner's appeal makes specific findings regarding whether the Project is substantially surrounded by urban uses. (*See* AR 26-29.) The same applies for the Planning Commission's findings and approval. (*See* 41-46; 47-66.)

City staff acknowledged that the phrase "substantially surrounded by urban uses is not defined within the statute. (AR 465.) Noticeably, the City did not make any specific findings that the Project is substantially surrounded by urban uses. (*See* AR 26-28; *see also* AR 42.)

The Staff Report discusses *Banker's Hillcrest, supra,* 139 Cal.App.4th at 270-271, where the court addressed the term "substantially surrounded by urban uses" by relying upon the discussion in *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511, 541. (See AR 78-79.) The *Banker's Hill* applied the *Friends of Mammoth* case which concluded that the term "urban" refers more to the location and varying characteristics of a use than to the type of use. In *Banker's Hillcrest,* the court found that the Balboa Park within the City of San Diego is an urban park surrounded by a densely populated area that included urban amenities. (*Id.* at p. 271.)

In contrast to *Banker's Hillcrest,* the City of Clayton is not comparable to the densely populated City of San Diego. While the project site's General Plan designation might be Multi-Family High Density Residential (AR 3626), the areas surrounding the project site do not have similar designations. (*Id.*) While, the General Plan designation to the north is Town Center Commercial, to the south it is *Rural Estate (0 to 1.0 units per acre)* and MHD, to the east Single Family High Density and Town Commercial and Town Center Commercial, and to the

West Town Center Commercial and *Rural Estate*. (*Id.*) Although the surrounding zoning classifications to the north, south, east, west are Planned Development, the western area is also zoned *Single Family Residential R-40-H (minimum lot area 40,000 square feet with equestrian uses.)* (*Id.*) Thus, while some of the area near the Project site is commercial and residential, a good portion of the area surrounding the project site is designated as *rural.* (*Id.*) This is not substantially surrounded by urban uses. In fact, during the March 3, 2020 City Council meeting Vice Mayor Wan raised the issue that the project site is not substantially surrounded by urban uses. As stated by the Vice Mayor "we're talking about properties that are neighboring -- multiple properties that are neighboring that can all have horses . . . I don't know what you consider rural, but if you have a horse, I'm calling you rural. (AR 554; *see also* AR 986-987.) As further stated by the Vice Mayor "horses equals rural". (*Id.*)

Relying upon *Banker's Hillcrest,* the City Staff asserted that "the fact that a site is bordered by a single-family home on one or more sides can serve as evidence that the project site is substantially surrounded by urban uses if the single-family homes are located within city limits, and particularly within the center or downtown of a city." (AR 78.) To the extent, the City staff's determination is based upon the facts of *Banker's Hillcrest* where the development was 14-residential units across the street from Balboa Park, the City misses the holding in *Banker's Hillcrest*, where the court that Balboa Park is a "quintessential urban park, heavily landscaped, surrounded by a densely populated area, and containing urban amenities such as museums, theaters and restaurants" and thus Balboa Park constituted an urban use. (139 Cal.App.4th at 271.) That is significantly different from the present matter where there are significant portions of the area around – up to 50 % - that are in fact designated as rural and have a minimum lot area of 40,000 square with equestrian uses allowed.

Also, the City staff's comments about residences across the street meet the requirement of "substantially surrounded by urban uses" are not consistent with the standard definition of the term "substantially." Meriam-Webster's Dictionary defines "substantially" to mean "considerable in quantity: significantly great" and "being largely but not wholly that which is

specified."[1] The Cambridge dictionary defines the term "substantial" to mean "to a large degree."[2]

A review of the map shows that there are single-family residences across Marsh Creek Road east of the Project site and some commercial sites to the north, but to west and the south is anything but urban as it is composed of large rural lots, some with homes and some zoned for equestrian activities. (AR 94-95, 618.) That does not meet the standard definition of "substantially" as discussed above.

It should also be noted that the Mitigated Negative Declaration adopted in 2012 in connection with the General Plan Amendment establishing the MRD Land Use designation (the "MND") establishes that the uses surrounding the Project Site, which has not been disturbed since that time, is not urban. Rather, the MND clearly states that the very type of high density development at issue in this appeal would cause that setting and surrounding uses to change from rural to urban. (AR 6652-6653; citing Resolution No. 10-2012 entitled "A Resolution Adopting the Housing Element Implementation Project Initial Environmental Study/Mitigated Negative Declaration, February 2012 (ENV 01-12), which states in pertinent part, as follows: "The development of the six project sites in accordance with the proposed Multifamily High Density General Plan Land Use designation would change the existing visual settings from primarily vacant land and large lot single-family residential uses to urban areas consisting of multi-family high density (MF/HD) residential developments." (citing Housing Element Implementation Project Initial Environmental Study/Mitigated Negative Declaration . . . ENV 01-12, at page 24).) (AR 6652-6653.)

As the City's reliance on the infill categorical exemption (CEQA Guidelines, § 15332) is not supported by substantial evidence, is inconsistent with the City's General Plan and Zoning Code and it is not surrounded by urban uses, approval of the Project constituted a prejudicial abuse of discretion and is contrary to law.

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1 *See* https://www.merriam-webster.com/dictionary/substantially

2 *See* https://dictionary.cambridge.org/dictionary/english/substantially

4. THE UNUSUAL CIRCUMSTANCES EXCEPTION APPLIES TO THE PROJECT

CEQA provides that if there is "reasonable possibility" that an activity will have a significant effect on the environment due to "unusual circumstances," an agency may not find the activity to be categorically exempt from CEQA. (CEQA Guidelines, § 15300.2(c).) The unusual circumstances exception applies when both unusual circumstances and a significant impact as a result of those unusual circumstances are shown. (*Berkeley Hillside Preservation v City of Berkeley* (2015) 60 Cal.4th 1086, 1104; *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1207.)

Whether a particular project presents unusual circumstances is a factual inquiry under which an agency weighs the evidence whether there is an unusual circumstance. (*Berkeley Hillside, supra,* 60 Cal.4th 1105, 1114.) Judicial review of that determination is whether the determination is supported by substantial evidence. (*Id.*) If there are unusual circumstances, then the second question that must be addressed is whether there is "a reasonable possibility of a significant effect on the environment due to" those circumstances. (*Id.* at p. 1115.) Judicial review of this determination is whether there is substantial evidence that that supports a fair argument that a significant impact on the environment may occur. (*Id.*)

The City's Tree Protection Ordinance (CMC, § 15.070.010) states:

> The City of Clayton contains many species of trees that are of great significance. It is recognized that the preservation of these trees enhances natural scenic beauty, sustains potential increases in property values, encourages high-quality development, *maintains the natural ecology, tempers extremes in climate, prevents erosion of top soil, aids in reducing air pollution, provides habitat for wildlife, and preserves the identity, character, and rural tradition of the City.* For these reasons, the City Council finds that regulating the removal of trees will promote the health, safety, and general welfare of the residents and property owners within the City consistent with the right of an individual to develop private property in a manner which will not be prejudicial to the public interest. It is not the intent of this ordinance to prevent the removal of undesirable trees or to restrict the reasonable rights of property owners, but only to encourage the planting and retention of desirable trees to protect the beauty and ecological balance of the natural surroundings.

The City's Tree Protection Ordinance also specifically protects certain varieties of trees. (CMC, § 15.70.015(C).) Section 15.70.015(C) provides:

> "Protected Tree" means any tree that is of the following varieties: Ash (Fraxinus Dipetala); Bay (Umbellularia Californica); Box Elder (Acer Negundo); Buckeye (Aesculus Californica); Cherry (Prunus Emarginata, Prunus Illicifolia, Prunus Subcordata); Cottonwood (Populus Fremontii); Elderberry (Sambucus Mexicana); Hop Tree (Ptelea Crenulata); Madrone (Arbutus Menziesii); Maple (Acer Macrophyllum); Oak (Quercus Agrofolia, Quercus Chrysolepis, Quercus Douglasii, Quercus Kelloggii, Quercus Lobata, Quercus Wislizeni); Sycamore (Platanus Racemosa); or Walnut (Juglans Hindsii).

In this matter, the Project site contains 152 trees between the three parcels (6170 High Street – 21 trees; 6450 Marsh Creek Road – 45 trees; and 6490 Marsh Creek Road – 86 trees). (AR 3639; *see also* AR 834.94-834.104 [Arborist Report].) Thirty-four trees are protected trees. (*Id.*; see CMC, § 15.70.015(C).) The Project includes the removal of 107 trees, 24 of which are "protected trees." (AR 3639.) While, the Project includes a tree-replacement plan, the approval includes a waiver to allow some of the replacement trees to be species not defined as "Protected Trees." (AR 9, 3639.) The removal of these protected trees may have significant impacts with respect to natural ecology, temperature extremes in climate, prevents erosion of top soil, aids in reducing air pollution, provides habitat for wildlife, and preserves the identity, character, and rural tradition of the City. (*See* CMC, § 15.070.010.) Moreover, nothing in the record demonstrates that the replacement of the protected trees will mitigate any such impacts.

B. THE PROJECT VIOLATES PROVISIONS OF THE CLAYTON MUNICIPAL CODE

1. STANDARD OF REVIEW

Code of Civil Procedure section 1094.5 sets forth the standard of review in an administrative mandamus proceeding as whether the agency committed a prejudicial abuse of discretion. An abuse of discretion is established when the agency has not proceeded in the manner required by law; the decision is not supported by the findings; or the findings are not supported by substantial evidence. (Code Civ. Proc. § 1094.5(b); *Western States Petroleum v. Superior Court* (1995) 9 Cal.4th 559, 571.)

In *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, the Court set forth the fundamental rules that apply to judicial review of findings in an administrative mandate proceeding:

> Implicit in section 1094.5 is a requirement that the agency which renders the

challenged decision must set forth findings to bridge the analytic gap between the raw evidence and ultimate decision or order. ... [The agency] must render findings sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis for the board's action. (11 Cal. 3d at 514-15)

2. THE PROJECT VIOLATES THE CITY'S OFF-STREET PARKING REQUIREMENTS

CMC section 17.37 sets forth the City's off-street parking requirements for new land uses. The purpose of the off-street parking regulations are in relevant part to ensure that off-street parking and loading facilities are provided for new land uses, promote compatibility among adjacent land uses, and ensure ha off-street parking are designed in a manner that will ensure efficiency, protect public safety and insulate surrounding land uses from adverse impacts. (CMC, § 17.37.010(A), (C), (F).)

CMC section 17.37.030A states that "off-street parking spaces shall be provided in accordance with Schedule 17.37.030.A. Section 17.37.030A also provides that "[O]ff-street loading spaces shall be provided for non-residential uses in accordance with Schedule 17.37.030.B or as required by the Planning Commission."

Based upon the number of units approved for the Project (45 one bedroom units and 36 two bedroom units), the Zoning Code section Schedule 17.37.030A requires that the Project provide approximately 2.23 onsite parking spaces per unit (i.e. 2.0 parking spaces for each 1 bedroom unit and 2.5 parking spaces for each 2 bedroom unit) for a total of approximately 180 parking spaces. The Project, however, includes only 106 onsite parking spaces, which is 41% less than the Zoning Code requires. The developer sought an waiver of the onsite parking requirements. (AR 6039.)

CMC section 17.90.090 states that the concession must be granted if the concession would have a specific adverse impact upon public health and safety or the physical environment. While the City granted the waiver for the amount of off-street parking requirements under 17.37.030A, substantial evidence in the record demonstrates that reducing off-street parking requirements by 41% less than the Zoning Code requires will have an impact to public safety due to the need for residents to park off-site and navigate busy roads. (See *supra.*) As City's findings are not supported by substantial evidence and the Project's approvals conflict the

Zoning Code, approval of the Project constitutes a prejudicial abuse of discretion and is contrary to law.

3. THE PROJECT VIOLATES CITY OF CLAYTON MUNICIPAL CODE § 17.92 AND GOVERNMENT CODE, SECTIONS 65915

The City of Clayton's Inclusionary Housing Ordinance sets forth the standards and procedures to facilitate the development and availability of housing affordable to a range of households with varying income levels to implement the City's Housing Element and as mandated by Government Code section 65580. (CMC, § 17.92.) CMC section 17.92.030(a) provides that "if the Residential Development includes ten (10) or more units, a minimum of 10% of all newly constructed for sale dwelling units in the Residential Development shall be developed, offered to and sold or rented to Very Low, Low and Moderate Income Households, in a ratio determined pursuant to section 17.92.060 at an Affordable Housing Cost."

CMC section 17.92.030(D) states that "[t]he number of Inclusionary Units required for a particular project will be determined at the time a land use application is filed by the Developer for a Residential Development with the City. If a change in the subdivision design results in a change in the total number of units, the number of Inclusionary Units required will be recalculated to coincide with the final approved project." This subsection states that, if, at the time the land application was filed, the number of "base" units was 60, then the number of required inclusionary units would be 10% of that number for a total of 6 required inclusionary units; however, because there was a subsequent change in the number of units from 60 to 81, this paragraph also makes it clear that the number of inclusionary units must be recalculated. Subdivisions E and F establish the method for doing the recalculation.

CMC section 17.92.030(E) provides that "[f]or purposes of calculating the number of Inclusionary Units required by this section, any additional units authorized as a density bonus under Chapter 17.90 and California Government Code Section 65915(b)(1) or (b)(2) will not be counted in determining the required number of Inclusionary Units." Thus, the additional 21 units that are requested to be authorized as a density bonus may not count toward the mandatory inclusionary housing requirement. Without this section, under 17.92.030(D), the prospective

increase in project size from 60 units to 81 units (based upon the requested 35% density bonus) would have resulted in the Real Party being required to choose between adding either 3 more inclusionary units, or 2 more inclusionary units and payment of an in lieu fee. None of which was done.

CMC section 17.92.030(F) provides that "[t]he number of Affordable Housing units that are provided in order to secure a density bonus under Chapter 17.90 and California Government Code Section 65915(b)(1) or (b)(2) will be counted toward the required number of Inclusionary Housing Units." Thus, while the 21 additional units comprising the density bonus were not added to the base number of units for purposes of determining the adjustment required under Paragraph D above, the number of dedicated units provided to obtain a density bonus were added to the number of previously required inclusionary housing units. In this case, as detailed above, in order to obtain the maximum density bonus of 35% (21 units), the Real Party must provide 9 Very Low Income Housing units. Thus, since the City approved the density bonus then these 9 "voluntary" Very Low Income units must be added to the 6 previously required inclusionary Very Low Income units to obtain a total of 15 required Very Low Income Inclusionary Units.

The City's approval of the maximum density bonus of 35% violates the City's Zoning Code. (CMC, § 17.92.030.) The "base" Project for which the developer claims entitlement to a density bonus and numerous concessions was claimed to be 60 units. (*See* AR 3626 [General Plan Designation of Multi-Family High Density – 20 units per acre.) Under the City's Inclusionary Housing Ordinance, a developer must allocate 10% of the units in the base project to Very Low, Low and Moderate Income Households, without the benefit of financial incentives of any kind. (CMC, §17.92.030(a).) Accordingly, Real Party was legally required to set aside a minimum of six (6) units for Inclusionary Housing before the City could consider a density bonus or concessions. The City, however, granted Real Party a 35% density bonus resulting in twenty-one (21) additional units, plus multiple incentives, including dramatically reduced park ratios and draconian tree removals, based solely on the developer adding just one (1) additional Very Low Income Housing unit to his prior land use proposal. Thus, out of the 81 total units

requested by the developer, only 7 (i.e. only 8.6% of the units), which is less than the mandatory 10% inclusionary housing that is required under the City's Code, is sufficient to trigger the bonus density and concessions granting the developer an additional 20 market rate units and concessions.

The number of very low income housing units necessary to obtain a 35% density bonus under Government Code section 65915 and CMC section 17.90.040 should be "9" based on the total number of units in the development including density bonus units, not just "7" based upon the number of original units in the base project.

Government Code Section 65915(f)(2) states that in order to receive the maximum density bonus of 35%, the Project must allocate 11% of all units in the Project to Very Low Income Housing. Unlike Government Code section 65915(b)(1)(B), which excludes any density bonus units for purposes of determining whether or not a proposed development qualifies for a density bonus, section 65915(f)(2), which establishes the scale of the density bonus, contains no such exclusion of the density bonus units in its tables or formulae. While the Project may qualify for a minimal density bonus simply by virtue of allocating 5% or more of its "base" units to Very Low Income Housing, in order to obtain the maximum density bonus available for Very Low Income Housing of 35%, Government Code section 65915(b)(1)(B) requires an allocation of 11% of the "total" units in the Project to Very Low Income Housing. Thus, in order to qualify for the requested maximum 35% density bonus, the Project had to pledge a minimum of 9 units to Very Low Income Housing (11% of 81 units = 8.91 units, and Government Code section 65915(f)(5) requires rounding up to the next whole number) – not 7 units as approved by the City, which is 11% of only the "base" number of units.

Inclusionary Housing under the CMC and affordable housing qualifying for bonus density under the Government Code must be counted separately. (CMC, § 17.92.030.) The total required Inclusionary Housing under CMC is the sum of the required inclusionary housing determined under CMC and the voluntary number of units allocated to Very Low Income Housing for purposes of obtaining a density bonus. CMC section 17.92.030 requires that Inclusionary Housing should neither be added to nor subtracted from the bonus density housing

formulas set forth in Government Code section 65915, which are discussed above. These are entirely separate statutory schemes, with two different purposes.

Accordingly, if the requested density bonus is ultimately approved, the developer will have the option to either build 60 units with 6 required Very Low Income inclusive units, OR to build 81 units with 15 required Very Low Income inclusive units, in which case the developer would be rewarded with an additional 12 market rate units out of the 21 additional units authorized by the contemplated density bonus. Once again, compare this to staff's apparent contention that the developer should only be required to allocate 7 units to Very Low Income Housing out of the 81 units in the development, despite the fact that the developer would been required to allocate 6 units to Very Low Income Housing even without receiving a density bonus.

As approval of the Project is inconsistent with the requirements for density bonus and inclusionary housing, approval of the Project constitutes a prejudicial abuse of discretion and is contrary to law.

4. The Project Violates City of Clayton Municipal Code § 17.44

The City's approval of the Site Plan does not conform to CMC section 17.44 as it is inconsistent with the General Plan (as discussed above), and fails to protection the reasonable maintenance of the privacy of adjacent property owners and of the existing views of adjacent property owners. Clayton Municipal Code section 17.44.010 provides that the "[t]he purpose of the Site Plan Review is to ensure that the design of all new development is compatible with Clayton's character and that the design and location of new development does not impose significant negative impacts on neighboring property owners and/or occupants." Section 17.44.040 provides in relevant part that the factors to be reviewed by the Planning Commission (or City Council upon appeal) shall include, but are not limited to:

A. Conformity with the General Plan and any applicable Specific Plan (e.g. Town Center, Marsh Creek Road).
B. Conformity with any applicable City adopted architectural and/or design standards (e.g. Oakhurst Country Club, Oakwood Subdivision, Clayton Station).

C. Preservation of general safety (e.g. seismic, landslide, flooding, fire, traffic).

* * *

E. The reasonable maintenance of the privacy of adjacent property owners and/or occupants.

F. The reasonable maintenance of existing views of adjacent property owners and/or occupants.

G. The new development, taken as a whole, need not be identical, but should be complementary with the adjacent existing structures in terms of materials, colors, size, and bulk.

The Project constitutes the construction of several three-story properties almost to the applicable property lines adjacent to an area that is designated as rural and will impact the privacy and views of adjacent property owners. (See AR 133-136.) Thus, the Project fails to satisfy the standards for review necessary for obtaining a Site Planning review permit as set forth in CMC §17.44.040. (*See* AR 133-136.)

The City determined that existing mature trees along the western property line of the Project and along the southern property line of 6490 Marsh Creek Road will help to ensure privacy for adjacent properties to the west and south. (AR 8, 3638-3639.) The City also found that the planting of new trees along the western property line of 6170 High Street would provide some additional screening. (AR 8.) The record, however, does not contain any study or further analysis to support the City's assertion that such actions will protect privacy.

In contrast, the adjacent property owners testified that the Project impacts the reasonable maintenance of their privacy as the residents of the new construction will be able to stare down at existing residences, even into their bedrooms.. (AR 133-136, 403-404, 409, 2389, 1608, 1609.) This overburdening of the land eliminates privacy to the owners of the adjacent properties. (*Id.*) Even if the "new" trees may provide some privacy, it may be several years until the trees mature sufficiently to provide the purported privacy. For instance, the removal of trees on High street have a trunk diameter of 124.5 inches, but will be replaced with a trunk diameter of 41 to 42 inches. (AR 3639.) Nothing in the Staff Report or the record discusses how long it will take for the trees to mature sufficiently to provide the purported privacy. Additionally, while bay trees may be evergreen, oak trees are not. As the oak trees are not evergreen, during a significant portion of the year the oak trees will not provide the purported

privacy that the City claims. Thus, as approved, the Project will impact the reasonable maintenance of the privacy of adjacent property owners and/or occupants.

The proposed Site Plan will block and all but eliminate existing views of adjacent property owners. (CMC, § 17.44.040(F).) Views of the surrounding area from Stranahan will be significantly impacted. (*See* AR 2389.)

The City found that Project is not identical with existing structures in term of design, materials, colors, size and bulk. (AR 9.) The City also asserts that the applicant requested a waiver of this standard under the Density Bonus Law. (*Id.*; *see* AR 6039-6041.) The City's findings, however, do not state that the waiver was granted. (*Id.*) The waiver application does not specifically reference section 17.44, but does state that the height, size and bulk to be increased (modified) which may impact view and privacy. (AR 6039; CMC, § 17.44.040(E), (F).) The waiver application, however, did not specifically seek a waiver from the requirement that the new development, taken as a whole, need not be identical, but should be complementary with the adjacent existing structures in terms of materials, colors, size, and bulk. (AR 6039: CMC, § 17.44.040(G).) The City made the unsupported determination that the Project is "complementary" to the existing structures. (*Id.*) In making this determination, the City relies only colors and texture to determine they are complementary. (AR 9.) The City, however, fails to state how a three-story building in this setting is complementary.

It without dispute that although the General Plan designation is Multi-Family High Density, the Project is completely out of character and scale with the existing improved properties in the area. (See AR 9; CMC, § 17.44.040(G).) The Project is three stories adjacent to properties whose General Plan is rural estate (0 to 1.0 units per acre) and single family residential R-40-H (minimum lot area 40,000 square feet with equestrian uses). (AR 3626.) There is no transition from the multi-family housing to the rural estate properties. As such, the new development taken as a whole, is not complementary with the adjacent existing structures in terms of materials, colors, size, and bulk. (CMC, § 17.44.040(G).) As the applicant did not seek a waiver of section 17.44.040(G), the City's findings are not supported by substantial evidence and not consistent with the requirements of 17.44.040.

IV.

CONCLUSION

Based upon the foregoing, Petitioner respectfully requests that the Court grant the Petition for Writ of Mandate and direct the City to vacate and rescind all project approvals, including Resolution No. 07-2020 and Resolution 06-2020.

DATED: August 24, 2020

Respectfully Submitted,

LAW OFFICES OF DONALD B. MOONEY

By _____
Donald B. Mooney
Attorney for Petitioner Clayton for Responsible Development

PROOF OF SERVICE

I am employed in the County of Yolo; my business address is 417 Mace Boulevard, Suite J-334, Davis, California; I am over the age of 18 years and not a party to the foregoing action. On August 24, 2020, I served a true and correct copy of

PETITIONER'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE

__X__(by mail) on all parties in said action listed below, in accordance with Code of Civil Procedure §1013a(3), by placing a true copy thereof enclosed in a sealed envelope in a United States mailbox in the City of Davis, California.

____(by overnight delivery service) via Federal Express to the person at the address set forth below:

___ (by personal delivery) by personally delivering a true copy thereof to the person and at the address set forth below:

___ (by facsimile transmission) to the person at the address and phone number set forth below:

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Representing Real Party in Interest William Jordan

I declare under penalty of perjury that the foregoing is true and correct. Executed on August 24, 2020, at Davis, California.

Donald B. Mooney