

**PLANNING COMMISSION MEETING  
THURSDAY, SEPTEMBER 10, 2020**

**DOCUMENTS RECEIVED AFTER  
PUBLISHED AGENDA**

## **ITEM #1 PH 20-061**

**Appeal of the Planning Director's Decision to  
Approve a Two-Year Extension of the  
Approved Mixed Use Development  
Located at 411 Industrial Blvd. and Mission Blvd.**

**PUBLIC COMMENTS**

September 3, 2020

File Number: 50HY-243220

**BY E-MAIL AND FEDEX**

Planning Commission  
City of Hayward  
c/o Sara Buizer, Planning Manager  
777 B. Street  
Hayward, CA 94541  
sara.buizer@hayward-ca.gov

Re: Appeal of Entitlement Extension for Mission Village Mixed Use Development  
Public Hearing: September 10, 2020

Dear Planning Commissioners:

This firm represents Valley Oak Partners, LLC, the developer of the Mission Village Mixed Use Development (Project). The City approved entitlements for the Project in 2017, consisting of Vesting Tentative Tract Map (VTTM) No. 8304 and Site Plan Review (SPR) No. 201504677. Construction was delayed due a lengthy environmental remediation process with the Regional Water Quality Control Board (RWQCB). As a result, Valley Oak applied for a two-year extension of the entitlements. The Planning Director approved the extension in March 2020, and thereafter Rosemarie Aguilar and Glenn Kirby filed an appeal. The appeal will come before you for public hearing on September 10.

We write to request that you follow staff's recommendation, uphold the Planning Director's decision, and deny the appeal. We incorporate by reference the letter submitted by Holland & Knight, dated August 19, 2020, detailing why the appeal has no merit. We write separately to further emphasize that (1) Valley Oak satisfies the Zoning Ordinance's entitlement extension criteria; (2) the Housing Accountability Act requires approval of the extension; and (3) Valley Oak has completed sufficient work to prevent the entitlements from expiring.

**I. VALLEY OAK SATISFIES THE ENTITLEMENT EXTENSION CRITERIA**

The only relevant issue presented by the appeal is whether Valley Oak satisfies the Zoning Ordinance's criteria for entitlement extensions. As explained below, Valley Oak does so because the construction delays were beyond Valley Oak's control, the Project remains in compliance with the City's development regulations, and there are no changed circumstances that would warrant a change in the Project.

## **A. Site Plan Review**

In considering an SPR extension, the “City shall consider (a) the cause for delay in submittal of the building permit; and (b) whether the proposal is in conformance with existing development regulations.” (Zoning Ordinance § 10-1.3055.)

As to factor (a), the delay was caused by a multi-year effort to remediate environmental contamination left on the Project site by a former dry-cleaning operation. (Staff report, p. 2.) The remediation process involved a lengthy consultation with the RWQCB and an extensive scope of work to remove contamination and prepare the Project site for construction. Valley Oak has detailed this process in a separate submittal to the City. Throughout the process, Valley Oak worked diligently to complete the remediation and satisfy the RWQCB’s requirements, and the resulting delays were beyond Valley Oak’s control. Therefore, the requested extension is justified and appropriate.

As to factor (b), the Project is in conformance with the City’s existing development regulations. As detailed in the staff report, the Project is consistent with the General Plan and Zoning designations, and it complies with all applicable standards and requirements, including as to permitted land uses, maximum floor area ratio, residential density, side setbacks, rear setbacks, building height, lot coverage, and affordable housing. (Staff report, pp. 2, 5–6, 7.) We also note that because Valley Oak obtained a vesting tentative map, it has a “vested right to proceed with development” in accordance with the development regulations in effect when its application was deemed complete. (Gov. Code §§ 66498.1, 66474.2.) So even if the City’s development regulations had changed in the interim, Valley Oak would still be in legal conformance.

## **B. VTTM**

The City may grant a VTTM extension upon “determination that circumstances under which the map was approved or conditionally approved have not changed to the extent which would warrant a change in the design or improvement of the tentative map.” (Zoning Ordinance § 10-10-3.246.) As explained in the staff report and the Holland & Knight letter, there are no such changed circumstances. The Project itself has not changed in any significant way. There have been no changes in the vicinity of the Project site during the past three years. There have been no changes to the Project’s environmental impacts or mitigation measures, as previously documented in the Initial Study/Mitigated Negative Declaration (IS/MND). And the City can continue to make the same entitlement findings that it made in 2017. (Holland & Knight letter, pp. 3–7; staff report, pp. 7–9.)

## **II. THE HOUSING ACCOUNTABILITY ACT REQUIRES APPROVAL OF THE REQUESTED EXTENSION**

To encourage development of new housing and relieve the state’s severe housing crisis, California enacted the Housing Accountability Act. (Gov. Code § 65589.5, subd. (a).) The Act prohibits a local agency from denying a residential project that complies with objective development standards, unless the agency makes two specific denial findings supported by a preponderance of the evidence. Specifically, the Act provides:

When a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete, but the local agency proposes to disapprove the project or to impose a 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 a preponderance of the evidence on the record that both of the following conditions exist:

(A) The housing development project would have a specific, adverse impact upon the public health or 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.

(B) 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.

(Gov. Code § 65589.5, subd. (j) [emphasis added]; see also *Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066, 1070.)

The Project qualifies for protection under the Act because it is a mixed-use development with at least two-thirds of the square footage designated for residential use, and because it complies with all applicable, objective development standards. As documented in the City’s own staff report, the Project complies with the Hayward 2040 General Plan and the applicable Sustainable Mixed-Use (SMU) designation, including as to permitted land uses, maximum floor area ratio, and other applicable goals and policies. (Staff report, p. 5.) The Project also complies with the Zoning Ordinance and the applicable Urban General Zone (S-T4), including as to permitted land uses, residential density, side setbacks, rear setbacks, building height, lot coverage, and affordable housing requirements. (Staff report, pp. 5–6, 7.)

The Act’s provisions also apply to the requested entitlement extension. The City’s discretionary decision on the extension is equivalent to its decision on the initial entitlements. If the City denied the extension, that would amount to a “disapproval” of the Project within the meaning of the Act. To the extent there is any ambiguity on this point, the Legislature has dictated that the Act be liberally “interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.” (Govt. Code

65589.5, subd. (a)(2)(L).) Therefore, the extension request comes within the scope of the Act, and the City cannot deny the extension unless it makes both of the required denial findings.

The City has not made, and cannot make, either of the required denial findings. There is no evidence that the Project would have a specific adverse impact upon public health and safety. In particular, the Project does not conflict with any written public health or safety standards, and the Project's IS/MND mitigates all potential impacts to a less-than-significant level. Even if there were a public health and safety impact, there is no evidence that the only way to address that impact would be through denying the Project, as opposed to imposing additional mitigation.

For these reasons, the City must deny the appeal and approve the requested entitlement extension. If the City fails to do so, it will be in violation of the Act and subject to penalties.

### **III. VALLEY OAK HAS COMPLETED SUFFICIENT PRE-CONSTRUCTION WORK TO PREVENT ENTITLEMENT EXPIRATION**

Under common law principles, Valley Oak has completed sufficient work on the Project to prevent its entitlements from expiring. (*See Cmty. Dev. Comm'n of Mendocino Cnty. v. City of Fort Bragg* (1988) 204 Cal.App.3d 1124.) These common law principles complement the City's extension process and further support the requested entitlement extension.

The *Fort Bragg* case confirms that zoning ordinance provisions calling for automatic expiration of entitlements do not apply where a developer has shown a "good faith intent" to proceed with its project. (*Id.* at 1130–31.) A developer can establish good faith intent in various ways, even in the "absence of actual on-site construction." (*Id.*) For example, good faith intent can be established by purchasing property; hiring architects, engineers, and other consultants; completing pre-construction work; surveying the property; performing soil borings; removing structures; submitting plans to the building department for plan check review; and obtaining funding commitments. (*Id.*)

Consistent with *Fort Bragg*, Valley Oak has established a good faith intent to proceed with the Project by undertaking significant pre-construction activities and expenditures. Valley Oak's efforts include, without limitation:

- Hiring environmental consultants, environmental engineers, civil engineers, architects, attorneys, and other development personnel.
- Engaging in a four-year environmental remediation process with the RWQCB to remove contamination left by the former dry-cleaning operation and prepare the site for construction.
- Conducting extensive testing and investigations on soil, soil vapor, and groundwater.

- Commissioning and implementing various reports and plans, including a Phase 1 site assessment, Phase 2 site assessment, Soil Vapor Investigation Report, Corrective Action Workplan, Vapor Intrusion Mitigation Plan, Environmental Impact Assessment, and a CLRRRA Response Plan.
- Obtaining demolition permits for the former dry-cleaning building; demolishing the building in phases; performing soil aeration work; and excavating, stockpiling, and disposing of contaminated soil in a hazardous materials landfill.
- Submitting the final map and improvement plans, and completing the plan check process with the City, such that the documents are now ready for final approval and recordation.<sup>1</sup>
- Incurring significant pre-construction costs to complete the work described above, totaling in excess of \$950,000. (And Valley Oak's total financial commitment to the Project to date is significantly more than that figure.)

This level of work, and the associated expense, more than satisfies the *Fort Bragg* test for preventing entitlement expiration. Accordingly, Valley Oak has a vested right to proceed under the existing entitlements, and this is yet another reason for the City to deny the appeal and grant the requested extension.

\* \* \* \* \*

For these reasons, as well as those set forth in the Holland & Knight letter, we request that you deny the appeal and approve the requested entitlement extension.

Valley Oak looks forward to working with the City to complete construction of this long-planned project, which fully complies with all development standards and will provide much needed housing in the City.

Very truly yours,



Arthur J. Friedman  
for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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<sup>1</sup> Ongoing processing of the final map and improvement plans, by itself, extends the VTTM for an additional 12 months. (Zoning Ordinance § 10-3.246.)

**From:** Steven Dunbar

**Sent:** Sunday, September 6, 2020 6:51 PM

**To:** CityClerk <[CityClerk@hayward-ca.gov](mailto:CityClerk@hayward-ca.gov)>

**Cc:** Sara Buizer <[Sara.Buizer@hayward-ca.gov](mailto:Sara.Buizer@hayward-ca.gov)>; Fred Kelley <[Fred.Kelley@hayward-ca.gov](mailto:Fred.Kelley@hayward-ca.gov)>; Charmine Solla <[Charmine.Solla@hayward-ca.gov](mailto:Charmine.Solla@hayward-ca.gov)>; Marcus Martinez <[Marcus.Martinez@hayward-ca.gov](mailto:Marcus.Martinez@hayward-ca.gov)>

**Subject:** Hayward Planning Commission 9/10/2020, Items 1 and 2

**CAUTION:**This is an external email. Do not click on links or open attachments unless you know the content is safe.

**Item 1:**

I also support denial of the appeal. As Minane put it best: This isn't a LEGO kit where we can snap on new units. The project has community support and should move forward. I also give my thanks to staff for maximizing bike and ped accessibility through the project.

The appellants are not wrong with their vision, but that vision should be applied to new projects and new discussions. The feedback from associations is important, but in fairness tends to be more homeowner focused when broader representation is needed. I hope that developers are continuing to reach out to more diverse groups beyond neighborhood associations.

**Item 2:**

I am quite happy to see the secure bike storage room within the apartment building, which will go along very nicely with the protected bike lanes currently in development in this area. The EV charging, solar panels, and rooftop deck for apartments are an excellent use of space in the urban fabric. It is also excellent to see the on-site affordable housing, especially a coveted VLI unit. These features are excellent and this project has my support.

Sincerely,  
Steven Dunbar



## **ITEM #2 PH 20-062**

**Proposed Multi-Family Residential Development with  
27 Townhome-Style Condominiums and 18 Apartment  
Units Located at 21659 Mission Blvd.**

**PUBLIC COMMENTS**

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**Sent:** Sunday, September 6, 2020 6:51 PM

**To:** CityClerk <[CityClerk@hayward-ca.gov](mailto:CityClerk@hayward-ca.gov)>

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