Oct 9, 2024

Mountain View City Council
500 Castro St.
Mountain View, CA 94041

Re: Builder's Remedy Projects in Mountain View

By email: citycouncil@mountainview.gov; Pat.Showalter@mountainview.gov; Lisa.Matichak@mountainview.gov; Margaret.Abe-Koga@mountainview.gov; Alison.Hicks@mountainview.gov; Ellen.Kamei@mountainview.gov; Lucas.Ramirez@mountainview.gov; Emily.Ramos@mountainview.gov

CC: cityattorney@mountainview.gov; city.mgr@mountainview.gov; community.development@mountainview.gov; city.clerk@mountainview.gov

Dear Mountain View City Council and City Staff,

The California Housing Defense Fund ("CalHDF") submits this letter to request that the Council and city staff comply with its obligations to process proposed builder's remedy projects under all relevant state and federal laws.

According to the Community Development Department's August 2024 report, the City is processing a number of builder's remedy applications:

- 294-296 Tyrella Avenue - 7-story, 85-unit apartment building
- 1500 N. Shoreline Boulevard - 1,914 unit project in eight buildings, each 9-15 stories
- 1920 Gamel Way - six-story, 216-unit condominium project
- 2645 – 2655 Fayette Drive - 7-story, 70-unit apartment building
- 901, 913, and 987 North Rengstorff Avenue - 15-story, 455-unit apartment development

The City is requiring these projects to comply with numerous aspects of its municipal code that together render the projects infeasible. The City's actions are a violation of the Housing Accountability Act ("HAA"). Separately, the City's continued imposition of fees in lieu of a dedication of parkland is in violation of the constitutional prohibition on exactions in excess of the impacts of proposed development.

I. The City Cannot Require Builder's Remedy Projects To Comply with Zoning and General Plan Standards

Density and height standards are not the only development standards that preclude housing development. The HAA requires that (emphasis added) **"**A local agency shall not disapprove a housing development project, including farmworker housing as defined in subdivision (h) of Section 50199.7 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 housing development 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 the evidence in the record, as to one of the following …" (Gov. Code, 65589.5, subd. (d).)

Based on our enforcement work, the City has some of the highest park fees in the state. In fact, the City itself has come to the conclusion that they are a barrier to housing. From the City's Housing Element, Appendix D, "The economic analysis that the City conducted as part of this Housing Element Update (see Appendix H) found that Mountain View's park dedication requirements have a moderate to major impact on development costs for rowhouses and a major impact on development costs for multifamily development."

Given the staggering land costs in the City, and the fact that the projects must provide 20% low-income housing, also requiring more than $70,000 in parks fees per unit is a clear violation of state law. (See Gov. Code, 65589.5, subd. (d).)

The City's view is that it can apply any/all provisions of its code to these projects, provided that they do not pertain specifically to density, based on its reading of Government Code, Section 65589.5, subdivisions (f)(1) and (f)(3). This is incorrect. Subdivision (f)(1) allows cities to apply development standards to housing developments if those standards are "appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need" and that these standards must be "applied to facilitate and accommodate development at the density permitted on the site and proposed by the development." Builder's remedy projects only arise when a City has failed to adequately plan for its share of housing production required under its Regional Housing Needs Allocation ("RHNA"). In this situation, none of a jurisdiction's development standards are consistent with meeting housing production goals, because that jurisdiction has failed to produce a plan to justify its policies at all. And again, the City here has *admitted* that the standard in question is a major factor in making housing development infeasible. There is simply no way that requiring a dedication of parkland from new housing development is consistent with meeting the City's RHNA goals.

The parkland dedication requirement is also not covered by subdivision (f)(3). That provision allows cities to apply "fees and other exactions authorized by state law." The parkland

dedication requirement is not an exaction, because if it were it would be prohibited under state law. The Mitigation Fee Act allows for municipalities to impose monetary exactions on development projects, but requires that certain procedures are followed. Critically, municipalities must establish that exactions are related to (Gov. Code, § 66001, subd. (b)) and proportionate with (Gov. Code, § 66005, subd. (a)) identified impacts of the new development. Cities normally establish this relationship through a nexus study. Here the parkland dedication requirement is a generally applicable zoning requirement, not an exaction. While other cities have enacted similar policies under the Mitigation Fee Act, Mountain View did not conduct a nexus study or otherwise establish the dedication requirement as mitigating the impacts of the proposed development. Lastly, the dedication requirement, even if viewed as an exaction, is not authorized by law because it violates the U.S. Constitution. (See Section II, *infra*.)

In accordance with general interpretive provisions for statutes, and due to statutory construction rules (Code Civ. Proc., § 1859), such general protections of (f)(1) and (f)(3) do not overrule the particular provisions of Government Code, Section 65589.5, subdivision (d). The City may not condition approval to require the projects to adhere to these various code sections without making health and safety findings as required by the HAA. (*Id*. at subd. (d)(2).) Finally, the legislature clearly establishes that it is the policy of the State that the Housing Accountability Act shall be "interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (*Id.* at (a)(2)(L).) Allowing cities to apply conditions of approval that render affordable housing developments infeasible through strained interpretations is clearly against the policy of the State of California. (See *California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 854.)

Given that these conditions have a tremendously adverse impact on project viability, if the City insists on applying these various conditions on the proposed builder's remedy projects, the state law (*id*. at subd. (i)) states clearly that it will bear the burden of proof in court (emphasis added):

> "If any city, county, or city and county denies approval or imposes conditions, including design changes, lower density, or a reduction of the percentage of a lot that may be occupied by a building or structure under the applicable planning and zoning in force at the time the housing development project's application is complete, that have a **substantial adverse effect on the viability or affordability** of a housing development for very low, low-, or moderate-income households, and the denial of the development or the imposition of conditions on the development is the subject of a court action which challenges the denial or the imposition of conditions, then the **burden of proof shall be on the local legislative body** to show that its decision is consistent with the findings as described in subdivision (d), and that the findings are

supported by a preponderance of the evidence in the record, and with the requirements of subdivision (o)."

II. The Parkland Dedication Requirement is a Per Se Regulatory Taking Under the Fifth Amendment of the US Constitution, and In-lieu Fee is an Unconstitutional Condition

The Fifth Amendment of the Constitution prohibits governments from taking private property without just compensation. The Fifth Amendment has been interpreted by the U.S. Supreme Court to prohibit zoning and land use regulations that effectively deprive an owner of protected property rights. (See *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104.) Perhaps the most clear cut regulatory taking occurs when a land use regulation allows for a permanent physical occupation of private property. (*Loretto v. Teleprompter Manhattan Catv Corp.* (1982) 458 U.S. 419.) There is perhaps no more obvious example of a violation of the regulatory taking doctrine than the policy enacted by Mountain View here. The City requires, through zoning regulation, that property owners deed their private property over to the City without just compensation, for public use as a park. The fact that this dedication is only required as a condition of approval for residential development does not allow it to escape constitutional scrutiny. The Supreme Court has long held that regulatory conditions on development approvals that would otherwise constitute takings must be reasonably related to mitigating impacts of that development, and roughly proportional to those impacts. (*Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 (*Nollan*); *Dolan v. City of Tigard* (1994) 512 U.S. 374 (*Dolan*).) The City has established no such relationship because it cannot. A desire to acquire and develop parkland is not an impact of new development to be mitigated, and even if it were, the $70,000 per unit fee is wildly out of proportion to any purported impact. The City is free to acquire property for new parks by acquiring property on the private market, or by use of eminent domain powers providing just compensation to property owners, but it cannot simply enact a regulation requiring that developers give land to the City without just compensation.

The City perhaps enacted the parkland dedication policy under the mistaken impression that it is rendered legal by allowing developers to pay a fee in-lieu of dedicating land for parks. Prior California caselaw had indicated that legislatively enacted fees are not subject to constitutional takings limits. (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 668.) Recently, the U.S. Supreme Court decided that this is definitely not the case. (*Sheetz v. Cnty. of El Dorado* (2024) 601 U.S. 267.) In *Sheetz*, the California Court of Appeal had ruled that a traffic impact fee was not subject to the requirements of *Nollan* and *Dolan*, because it was a legislatively enacted exaction, following the *San Remo Hotel* decision. (*Sheetz v. County of El Dorado* (2022) 84 Cal.App.5th 394, 407 .) The U.S. Supreme Court overturned this ruling, finding that fees imposed as legislative enactments are subject to *Nollan* and *Dolan*. (*Sheetz*, 601 U.S. at 280.) After the *Sheetz* decision, there is no question that the *Nollan* and *Dolan* standards apply to the parkland dedication and in-lieu fee

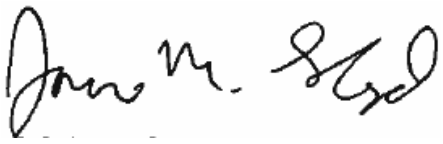
requirements at issue for these developments. Because the City has not established any nexus between new development and the need to acquire and develop parkland, nor that the $70,000 fee is proportionate to any impacts of new housing on parkland, the City is prohibited from applying this policy to new housing development including the five proposals currently under consideration.

As you are well aware, California remains in the throes of a statewide crisis-level housing shortage. If we do not allow sufficient housing development, more and more Californians will become and remain homeless. CalHDF urges the City to approve these builder's remedy projects without imposing the conditions, as is required by state and federal law. If the City declines to heed the above guidance and imposes the park dedication requirements on these or any other housing developments, CalHDF is prepared to bring legal action to invalidate these conditions and the citywide policy.

CalHDF is a 501(c)3 non-profit corporation whose mission includes advocating for increased access to housing for Californians at all income levels, including low-income households. You may learn more about CalHDF at www.calhdf.org.

Sincerely,

Dylan Casey
CalHDF Executive Director



James M. Lloyd
CalHDF Director of Planning and Investigations