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December 16, 2022

Matt Treber
Chief of Development Services
County of Madera
200 W. 4th St. Suite 3100
Madera, CA 93637

Dear Mr. Treber:

We are pleased to submit this application on behalf of nonprofit community development organization Self-Help Enterprises, Inc. ("Applicant"), the applicant for the River Grove Project ("Project"). This Application for a development permit invokes the streamlined ministerial approval process mandated by state law pursuant to Section 65913.4 of the Government Code, as originally enacted by Senate Bill 35 of 2017 ("SB 35").

The River Grove Project will provide desperately needed affordable and supportive housing opportunities for lower-income households at an infill location, on a site that has long been zoned and planned for housing development of this type. State housing law strongly supports the prompt approval of projects such as this one in light of what the State Legislature has recognized as a statewide "housing supply and affordability crisis of historic proportions" which is "hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state's environmental and climate objectives." Gov. Code § 65589.5(a)(2)(A)). Specifically, this Application invokes, *inter alia*, the following state housing laws:

- Gov. Code § 65913.4, SB 35's streamlined ministerial approval statute
- Gov. Code § 65589.5, the Housing Accountability Act (the HAA)
- Gov. Code § 65915, the State Density Bonus Law

Our firm's West Coast Land Use & Environmental Practice Group focuses specifically on enforcing the requirements of these and other California housing production laws. As enacted by the Legislature, and interpreted by the courts, SB 35 imposes on agencies a "ministerial duty to approve a project" that can be enforced in court by a project applicant, but the law does *not* "create a duty to reject a nonconforming project," and therefore creates no right for a project opponent to sue an agency for approving an SB 35 permit. Ruegg & Ellsworth v. City of Berkeley (2021) 63 Cal.App.5th 277, 299; Friends of Better Cupertino v. City of Cupertino, No. 18-CV-330190 (Santa Clara Cty. Super. Ct. May 6, 2020). This Application sets forth that all applicable requirements of each law are satisfied and therefore approval of the Project is a

mandatory and ministerial act. SB 35 is "interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, increased housing supply," and disapproval of an SB 35 application is only permissible if there is no "substantial evidence that would allow a reasonable person to conclude that the development is consistent with . . . [SB 35's] objective planning standards." Gov. Code § 65913.4(c)(3), (n); *see also* Ruegg & Ellsworth, 63 Cal.App.5th at 299-301; California Renters Legal Advocacy & Education Fund v. City of San Mateo, 68 Cal. App. 5th 820, 844 (SB 35 and HAA are both applied under a "rigorous independent review" that does not defer to the locality but instead strongly favors housing approval). Under this legal standard, there is no reasonable question about whether the Project meets SB 35's criteria. The County would incur substantial liability (including liability in mandamus, an award of attorney's fees, and fines of between $1.2 million to $7.5 million) in what we hope is the unlikely event that the County were to refuse to issue the requested streamlined ministerial permit.

As you know, the Applicant previously sought approval for the River Grove Project pursuant to the County's standard discretionary Conditional Use Permit (CUP) process. The Applicant appreciates County staff's recommendation in favor of approval of this CUP, as well as the Planning Commission's adopted resolution recommending CUP approval. Despite this support from County decision-makers, and additional support the Project received from many members of the community, some neighbors mobilized "Not In My Backyard" (NIMBY) opposition, as is regrettably common when nonprofit organizations propose housing opportunities for lower income households.[1] One group of opponents made clear they would sue the County if the County allowed lower-income housing to be built on the site, using litigation under the California Environmental Quality Act (CEQA) as a vehicle to stop the Project. The Applicant's attempts to reach out to opponents to discuss their concerns about the Project were met with a refusal to even discuss the matter.[2]

For more than thirty years, the California Supreme Court has been repeatedly warning that CEQA and other "rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." Berkeley Hillside Preservation v. City of Berkeley (2015) 60 Cal.4th 1086, 1108 (*quoting* Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 576). As the California Court of Appeal recently noted with dismay, "CEQA was meant to serve noble purposes, but it can be manipulated to be a formidable tool of obstruction, particularly against

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[1] See July 26, 2022 Madera County Board of Supervisors Meeting video referring to neighbor opposition, available at: http://maderacountyca.iqm2.com/Citizens/SplitView.aspx?Mode=Video&MeetingID=2964&Format=Agenda/. A transcript is attached. Neighbors voiced opposition on the basis of the affordable and supportive aspects of the project, stating concerns about crime and sanitation. See the following public comments: 29:59 (expressing concern about the mental health condition of residents), 47:06 and 57:09 (expressing frustration and government subsidized housing), 1:10:08 (opposing the affordable and supportive nature of the project), and 59:56 and 1:14:32 (expressing concerns about increased crime near a school). There is substantial evidence that project opponents were motivated to object to the project, and to threaten litigation, in bad faith, vexatiously, for the purpose of delay, or to thwart the low-income nature of the Project. State law strongly disfavors litigation brought for these reasons, and such project opponents would be required to post a substantial bond to be forfeited to the Project Applicant if they sought to challenge the County's decision to approve the Project in court. *See* Code Civ. Proc. § 529.2.

[2] See attached email.

proposed projects that will increase housing density." Tiburon Open Space Committee v. County of Marin (2022) 78 Cal.App.5th 700, 782.[3] Yet these clear pronouncements have not yet deterred housing opponents from using CEQA litigation to stop much-needed housing.

Situations like this one are the precise reason the Legislature enacted SB 35 to eliminate discretionary review and attendant CEQA litigation risk for projects that conform to objective standards and meet SB 35's labor, affordable housing, and other standards. In many other states, a zoning-compliant development such as the Project would always be approved on an as-of-right or ministerial basis, because "the original theory of zoning presupposed that conforming projects would be approved as of right . . ." Christopher S. Elmendorf, Beyond the Double Veto: Housing Plans As Preemptive Intergovernmental Compacts (2019) 71 HASTINGS L.J. 79, 88. But in California, the process of entitling a housing project, even one that conforms to zoning, has "become thoroughly discretionary, requiring project-by-project negotiations over design, scale, public benefits, affordable housing set asides, and so much more." Ibid. "Local governments and neighborhood NIMBYs use this discretion to kill projects they dislike, and though some projects make it through, the delays and uncertainties can be very costly." Ibid. The Legislature, on the basis of ample evidence,[4] has determined that California simply cannot afford this type of discretionary review and CEQA litigation risk for zoning-compliant affordable housing projects if the state is to ever come close to addressing its affordable housing crisis. As a result, SB 35 turns the approval of the Project into a mandatory rather than discretionary act, and creates an enforceable duty on the County to approve the Project. Since its enactment in 2017, SB 35 has facilitated the ministerial approval of numerous housing developments throughout the state, and has been particularly utilized by nonprofit developers like the Applicant building 100% affordable housing developments.[5]

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[3] Citing Comment, A Twisted Fate: How California's Premier Environmental Law Has Worsened the State's Housing Crisis and How To Fix It (2022) 49 PEPPERDINE L.REV. 413, 467; Jennifer L. Hernandez, California's Environmental Quality Act Lawsuits and California's Housing Crisis (2018) 24 HASTINGS ENVTL. L.J. 21, 23, 25, 29, 41, 40.

[4] *See, e.g.*, Hernandez, supra, at note 3; Jennifer L. Hernandez *et al.*, In the Name of the Environment (2015); Moira O'Neill, *et al.*, Getting it Right: Examining the Local Land Use Entitlement Process in California to Inform Policy and Process (Berkeley Law Center for Law, Energy & the Environment; Berkeley Institute of Urban & Regional Development, Columbia Graduate School of Architecture, Planning & Preservation, February 2018), available at https://www.law.berkeley.edu/wp-content/uploads/2018/02/Getting_It_Right.pdf (in major jurisdictions, "even if . . . developments comply with the underlying zoning code, they require additional scrutiny from the local government before obtaining a building permit," which "triggers CEQA review of these projects"; "Our data shows that in many cases, these cities appear to impose redundant or multiple layers of discretionary review on projects"); Moira O'Neill *et al.*, Developing Policy from the Ground Up: Examining Entitlement in the Bay Area to Inform California's Housing Policy Debates, 25 HASTINGS ENVTL. L. J. 1, 73-77 (2019); Christopher S. Elmendorf, Beyond the Double Veto: Housing Plans As Preemptive Intergovernmental Compacts (2019) 71 HASTINGS L.J. 79, 132-34 (noting that especially before 2017, local jurisdictions were largely free to ignore their own plans for meeting regional housing goals, and could always use CEQA to kill housing approvals).

[5] *See* Marisa Kendall, "Is California's most controversial new housing production law working?", Bay Area News Group, Nov. 24, 2019; San Francisco Planning Department, "SB 35 Implementation and Approved Projects" (May 19, 2021).

PROJECT DESCRIPTION

The Project Site that is the subject of this Application is legally described in, and generally depicted on the site map accompanying, the Project's Preliminary Application and Notice of Intent, attached hereto as Attachment A. Under SB 35, a locality lacks any authority to disapprove, or condition approval, on the basis of subjective judgment. Accordingly, the Applicant is legally entitled to request approval with no conditions other than compliance with previously adopted objective standards. Despite this, in a show of good faith and respect for County officials who previously negotiated significant commitments from the Applicant to meet concerns raised by members of the community, the Applicant is voluntarily agreeing to accept as part of the currently proposed Project the conditions of approval that were attached to the CUP approved by the Planning Commission. These include, *inter alia*, commitments to provide parking beyond the amount that can be legally required, and to make contributions to road improvements that the County would otherwise have no ability to demand of the Applicant. Additionally, and again although not required by SB 35, the Applicant proposes that the Project be subject to a condition of approval that the Applicant offer to convey an exclusive easement or other interest to a conservation organization to provide further assurance that the "no build" riparian area to the north of the Project Site will remain undeveloped. The Project is otherwise the same Project proposed in the CUP process, which County staff and the Planning Commission both independently determined to comply with all applicable provisions of the County's General Plan, Oakhurst Area Plan, and County zoning ordinance, with the exception of those standards waived or relaxed pursuant the State Density Bonus Law. *See* Staff Reports, conditions of approval, and Planning Commission resolution, attached as exhibits to Attachment B.

The Project proposes 118 homes of affordable rental housing, two on-site managers units, and a community center, housing an estimated 342 residents. The project will employ three to four people who will work 9:00 am – 5:00 pm Monday through Friday. Two of the employees (property managers) will live on the project site. With the exception of the two managers' units, all homes will be affordable to lower income households and a covenant requiring affordability for at least 55 years will be recorded against the property. The project will consist of two phases; the first phase will involve constructing seventy units and fifty units in the second phase, with a total of twelve three-story apartment buildings and a community center. The project will include 156 parking spaces (asphalt), including parking for Electric Vehicles (EV) and parking compliant with the Americans with Disabilities Act (ADA) compliant.

APPLICABLE LAWS

SB 35/Government Code Section 65913.4

It is not the Applicant's burden to establish the Project's consistency with applicable objective standards; it would be the County's burden to establish the contrary. *See* Gov. Code § 65913.4(b)(1). Notwithstanding this, this Application contains a detailed submission affirmatively demonstrating that the Project complies with all of SB 35's objective planning standards, attached

hereto as Attachment B. As noted above, compliance with these standards is established under a standard highly deferential to approval of the development.

In reviewing this application, any public oversight must be "strictly focused on assessing compliance with criteria required for streamlined projects, as well as any reasonable objective design standards published and adopted by ordinance or resolution by a local jurisdiction before submission of a development application, and shall be broadly applicable to development within the jurisdiction," and this review "shall not in any way inhibit, chill, or preclude the ministerial approval" required by SB 35. Gov. Code § 65913.4(d).

Because the statute mandates that the process is ministerial and that projects are judged purely on objective standards that do not involve the exercise of discretion, CEQA does not apply to the SB 35 process. *See* Gov. Code § 65913.4(a), (m); 14 Cal. Code Regs. §15268(a); Pub. Res. Code §21080(b)(1); *see also* Ruegg & Ellsworth, 63 Cal.App.5th at 306 (there is "no requirement for CEQA compliance under section 65913.4").

Since the Project meets all other applicable planning standards in the SB 35 statute, the Project is entitled to approval through SB 35's ministerial approval process rather than through the discretionary use permit process that would otherwise apply. *See* Gov. Code § 65913.4(a). The Applicant therefore requests a permit providing the legal equivalent of the CUP for which the Applicant previously provided. SB 35 further provides that a project applicant is entitled to receive a subdivision approval, such as a parcel map, through the ministerial process provided in SB 35 rather than through the discretionary review process that would otherwise apply to a subdivision approval, as long as the Project complies with the applicable objective subdivision standards in the local subdivision ordinance. *See* Gov. Code § 65913.4(d)(2). Here, the Applicant requests a vesting tentative parcel map to divide the current parcel into two separate legal parcels. As set forth in the objective standards table and vesting tentative parcel map application attached in Attachment C, this request and this Project comply with all applicable objective provisions of the County's subdivision ordinance. Accordingly, approval of a vesting tentative parcel map to divide the parcel is also mandatory under the provisions of SB 35.

Although the applicant is seeking a parcel map to establish two legal parcels, which represent two distinct phases of development, Self-Help Enterprises (SHE) intends to retain control over both parcels in perpetuity and at a minimum for the 55-year affordability period. SHE will serve as the managing general partner (MGP) through a limited liability company (LLC), of which SHE will be the sole member and manager of the LLC. As the MGP, SHE will be responsible for all aspects of leasing and operations, and will effectively operate the two phases of housing as one seamless rental housing community. SHE will also effectuate the recordation of a Joint Easement Agreement (JEA) that will allow for the sharing of all amenities and circulation on the site, including the shared drive isles, all parking, trash enclosures, open space and the on-site community building. The JEA allows the project to function as one large rental community and ensures all units have access to all amenities on the site.

State Density Bonus Law

For the purposes of SB 35, "additional density or any other concessions, incentives, or waivers of development standards granted pursuant to the Density Bonus Law in Section 65915" are not considered when assessing the project's compliance with the County's objective standards. Gov. Code § 65914.3(a)(5). As a 100% affordable housing project, the Density Bonus Law entitles the Project to a density bonus of up to 80%, up to four "incentives," a waiver of all development standards that would physically preclude a project at the density to which it is entitled, and a reduction in parking requirements. *See* Gov. Code § 65915(b)(1)(G), (d)(2)(B), (f)(3)(D)(i), (p)(3).

The Applicant proposes only 24 "bonus" units in addition to the 96 units allowed under base zoning (i.e., a 25% density bonus instead of the 80% bonus permitted). The Applicant also requests the same Density Bonus Law incentive sought when the project was proposed through the CUP process: to increase the maximum building height from 35 to 45 feet (a modification to which the applicant also could have been entitled as a "waiver"). The Applicant also requests parking reductions, pursuant to Gov. Code § 65915(p)(1) and (p)(4), to the extent necessary to reduce parking requirements to permit the Project's 156 parking spaces. (This parking reduction does not count as one of the four incentives to which the Applicant is entitled; the parking reduction is provided automatically at the request of the applicant. *See* Gov. Code § 65915(p)(9).)

These relatively modest modifications are substantially less than the full amount of Density Bonus Law requests to which the Project is entitled, and the Applicant reserves its right to request additional Density Bonus Law benefits to the extent necessary to permit the Project. Recent case law re-affirms that requests such as these can only be denied if a locality meets a high burden of proof to show that an incentive will not result in cost reductions or that one of the very narrow circumstances that allow disapproval are present. *See* Schreiber v. City of Los Angeles (2021) 69 Cal. App. 5th 549, 556; Bankers Hill 150 v. City of San Diego (2022) 74 Cal. App. 5th 755, 769. As established in the CUP Staff Report and Planning Commission resolution, none of the circumstances that would permit denial of the Density Bonus requests apply here and the Applicant is entitled to these Density Bonus Law requests.

Like SB 35, the SDBL "shall be interpreted liberally in favor of producing the maximum number of total housing units." Gov. Code § 65915(r). The law also creates a cause of action in mandamus for a project applicant to litigate against an improper denial of a Density Bonus Law request, and recover its attorneys' fees for doing so. Gov. Code § 65915(d)(3) & (e)(1).

Housing Accountability Act

SB 35 expressly provides that SB 35 projects are additionally entitled to the protections of the Housing Accountability Act. Gov. Code § 65913.4(i)(2); *see also* 40 Main Street Offices LLC v. City of Los Altos, No. 19-CV-349845 (Santa Clara Cty. Super Ct. April 27, 2020); 40 Main Street Offices LLC v. City of Los Altos, No. 19-CV-349845 (Santa Clara Cty. Super Ct. Sep. 20, 2020); Ruegg & Ellsworth v. City of Berkeley, No. RG-18930003 (Alameda Cty. Super. Ct. Feb.

22, 2022) (Housing Accountability Act provisions, including fines, penalties, and bond requirements, apply to SB 35 projects). Here, the project is protected under the HAA because it consists of at least two-thirds residential uses, and because it meets both of the two independent prongs of the HAA: it complies with the County's objective standards, and it provides much more than the minimum 20% lower-income housing units necessary to qualify as a housing development for lower-income households. Gov. Code § 65589.5(d), (j). A locality is only permitted to reject a project protected by the HAA if it can make findings based on a preponderance of evidence that the project would have a significant, unavoidable, and quantifiable impact on "objective, identified written public health or safety standards, policies, or conditions." Gov. Code § 65589.5(j). The Legislature has affirmed its expectation that these types of conditions "arise infrequently." Gov. Code § 65585.5(a)(3). Here, there is no evidence, let alone a preponderance of evidence, that the project would have any impact on objective public health and safety standards, let alone an impact that cannot be feasibly mitigated. Therefore, project disapproval would violate the HAA in addition to SB 35.

A broad range of plaintiffs can sue to enforce the Housing Accountability Act, and the County would bear the burden of proof in any challenge. Gov. Code §§ 65589.5(k), 65589.6. As reformed in the 2017 legislative session, the act makes attorney's fees and costs of suit presumptively available to prevailing plaintiffs, requires a minimum fine of $10,000 per housing unit for jurisdictions that fail to comply with an order compelling compliance with the HAA, and authorizes fines to be multiplied by five times if a court concludes that a local jurisdiction acted in bad faith when rejecting a housing development. Gov. Code § 65589.5(k), (*l*). Bad faith includes any situation in which a decision is made that is entirely without merit. Gov. Code § 65589.5(*l*). For this 120-unit project, applicable fines would range from a minimum of $1.2 million to $7.5 million.

As in SB 35, and again as affirmed in recent case law, the question of whether a housing disapproval complies with the HAA is resolved under a standard of review that is extremely deferential to the applicant. *See* Gov. Code § 65589.5 (f)(4) (a housing development complies with applicable standards if "there is substantial evidence that would allow a reasonable person to conclude" that it conforms); *see also* Gov. Code § 65589.5(a)(2)(L) ("It is the policy of the state that. . . [the HAA] should be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing"). In affirming the constitutionality and enforceability of this standard of review, the Court of Appeal has held that "because the HAA cabins the discretion of a local agency to reject proposals for new housing," judicial review will not defer to local government decisions to deny housing but will instead strongly favor the approval of housing. California Renters, 68 Cal. App. 5th at 844.

CONCLUSION

We would be pleased to answer any questions County staff may have about this application, and appreciate County staff's careful review of this and the previous application for the River Grove Project. In light of the urgent need for the housing opportunities that this Project would provide, we respectfully request the County's issuance of the streamlined ministerial permit requested in this Application as soon as possible.

Very truly yours,

HOLLAND & KNIGHT LLP

/s/ Daniel R. Golub

Daniel R. Golub
Melanie Chaewsky

Counsel for Self-Help Enterprises, Inc.

ATTACHMENTS

A. Attachment A, Preliminary Application and Notice of Intent, including site plan, legal description of Project Site, and elevations.
B. Attachment B, SB 35 Eligibility Documentation
C. Attachment C, Subdivision Objective Standards Table and Vesting Tentative Parcel Map Application
D. Attachment D, references cited in this Application