

LOCAL NEWS

San Rafael analysis favors Dominican housing developer



A gate stands at the border of a 19-acre parcel along Deer Park Avenue in San Rafael on Thursday, June 1, 2023. A developer wants to build dozens of homes at the site, which used to belong to Dominican University of California. (Alan Dep/Marin Independent Journal)

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The city of San Rafael has notified the developers of a 19-acre parcel adjacent to Dominican University that four of the five applications they have submitted are potentially vested under the “builder’s remedy.”

The so-called builder’s remedy, which was established by a provision of the Housing Accountability Act, mandates that if a city or county lacks a “substantially compliant” housing element, the jurisdiction is precluded from using its zoning or general plan standards to reject any housing project that meets certain affordability requirements.

“It’s not looking great for the neighborhood,” said Tylee Holden, a resident who is leading opposition to the proposals.

The California Department of Housing and Community Development has specified that if a developer submits a preliminary application while a city or county is subject to the builder’s remedy, that developer will secure a vested right to develop the project — even if the jurisdiction eventually adopts a compliant housing element before the project is approved.

In the Dominican case, the developer filed the applications before the state approved San Rafael’s new housing element on June 22.

In its letters to the developer, San Rafael said three of the five applications contain “deficiencies” related to qualifying for the builder’s remedy and receiving approval for additional homes through state density bonuses. According to San Rafael planner Monica Ly, who signed the letters, one of the applications has only a density bonus deficiency and another application has only a builder’s remedy deficiency.

Under state law, however, the developer is allowed to amend the applications to cure the deficiencies while still retaining vested rights, provided that the number of homes or total square footage of the project doesn’t increase by more than 20%.

“That is my understanding,” Ly said.

As a result, the developers could choose any of at least four options to develop the property without complying with zoning or general plan standards.

The applications were submitted by Ray Cassidy/Dominican Valley LLC, but Martin Coyne and Marcia May are listed as the owners of the property. Coyne and May purchased the property from Dominican University of California in May.

Ly said the first application Cassidy submitted, on June 7, did not expressly state that he would seek builder's remedy rights. The other four applications did.

Nevertheless, Ly said in her letter to Cassidy that the first version also "has vested rights." Nira Doherty, outside counsel hired by San Rafael, declined to say if the application might ultimately qualify for builder's remedy protections.

Two of the applications for the site are virtually identical, proposing 29 dwellings in two-story detached homes and three-story townhomes. One of these applications calls for three of the dwellings being affordable to people with low incomes, while the other calls for four very-low-income residences.

The most ambitious proposal calls for 75 residences in three-story townhomes. Ten would be affordable to people with low incomes.

Another application scales the size of the project down to 54 residences in three-story townhomes, two-story detached homes and duplexes. Seven of the residences would be for people with low incomes.

The fifth application proposes 36 residences in two-story detached homes and three-story townhomes. Five would be low-income residences.

All of the applications propose using a state density bonus to reach the desired number of homes. In four of the cases, the city has determined that the developer overestimated the number of homes to which he is entitled.

As a result, Cassidy will need to increase the number of affordable homes or decrease the total number of dwellings proposed in those applications. For example, without more low-income dwellings, the 75-home project would have to be reduced to 68.

In order to qualify for the builder's remedy, the developers would also have to increase the number of affordable homes in all of the applications. At least 20% of the proposed homes must be affordable for low-income residents or 100% of the homes must be affordable for moderate-income residents.

In the 75-home proposal, for example, the developer would have to increase the number of low-income residences from 10 to 15 to meet the requirement.

The city's new housing element included the property as an opportunity site for 32 homes, but the property was removed later. The property is zoned to allow 2.2 residences per acre.

Holden said her chief concern is the effect that the development would have on the evacuation of the neighborhood in case of a fire. Holden said when there was a small fire last year, she couldn't

“We had people coming up from Magnolia Avenue and down from Highland Avenue, and they got trapped on Deer Park,” Holden said. “That street at its most narrow width is only 12 feet. This is not just a NIMBY situation. What it comes down to is a risk to human life.”

She and other neighbors opposing the project have hired Len Rifkind, an attorney and former Larkspur councilman, to represent them. Rifkind isn't so sure that the applications qualify for builder's remedy treatment.

“This is new law. The courts haven't ruled on what substantial compliance means,” Rifkind said. “I would suggest that the city substantially complied.”

Rifkind might be referring to the fact that even though the state's housing department approved San Rafael's housing element on June 22, the department received the document on May 18, before any of the applications were filed.

In an email, Alicia Giudice, San Rafael's director of community development, wrote, “Even if the applicant were to resubmit a preliminary application under the ‘builder's remedy,’ the proposed project would still be subject to discretionary review by the city.”

SB 330 allows cities and counties to require that proposed developments comply with objective design standards that are consistent with the state's goals for meeting its future housing needs.

But an analysis by the Hanson Bridgett law firm found that the provision is murky.

“It remains to be seen how this provision is meant to interact with the Builder's Remedy and which, if any, development standards or policies can be deemed ‘consistent with’ meeting Regional Housing Needs Allocation needs,” the analysis said.

Builder's remedy projects also remain subject to the California Environmental Quality Act. According to Hanson Bridgett, however, “it is unclear to what extent a jurisdiction can deny a Builder's Remedy project based on the information reported in a CEQA environmental review document.”

Other attorneys opine that while jurisdictions may not be able to deny projects using CEQA, they may be able to use it to require mitigations.

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