

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

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July 22, 2020

Brian P. Gabler, City Manager
City of Simi Valley
2929 Tapo Canyon Road
Simi Valley, CA 93063

Re: Approval of the Tapo-Alamo Project and Notice of Potential Housing Law Violations

Dear Brian Gabler:

The California Department of Housing and Community Development (HCD) continues to monitor the Tapo-Alamo project (PD-S-1045/TP-S-685/AHA-R-061) in its review by the City of Simi Valley (City). HCD understands the City Council, which originally continued its March hearing of the project until April 6, 2020 and has further continued the matter until August 2020. The purpose of this letter is to further advise the City of its obligations under the Housing Accountability Act and the Housing Crisis Act when it takes up the matter again.

Procedural and Substantive Requirements for Disapproval of the Project

HCD observed with some concern the City's deliberations on the project at its March 9, 2020 hearing. The Council seemed inclined to act contrary to law and disapprove the project. HCD reminds the City that it may not disapprove the project during this critical housing crisis unless it can make written findings, based on a preponderance of the evidence in the record, that the project:

would have a **specific, adverse impact upon the public health or safety**, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households. (Gov. Code, § 65589.5, subd. (d)(2), emphasis added.)

Government Code section 65589.5 defines with specificity the sort of impact that would support this finding:

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. (Gov. Code, § 65589.5, subd. (d)(2), emphasis added.)

Note that merely being inconsistent with any particular zoning code standards or general plan designations, if such an inconsistency were present, would not suffice to support this finding. (Gov. Code, § 65589.5, subd. (d)(2).)

Further, no “specific, adverse impact” has been identified by the City during the three years of its review of the project—including during the public environmental review process that produced an initial study/mitigated negative declaration and then environmental impact report, and during the six public hearings on the project to date. This was confirmed by City staff and the City’s Attorney at the March 9, 2020 hearing.

HCD notes the record on this issue appears to be as follows:

- The EIR prepared for the project concluded that all potential impacts on the environment, including traffic and safety impacts, would be less than significant or less than significant with appropriate mitigation. (DEIR, pp. ES-3 to ES-13.)
- The draft environmental findings prepared by staff for the project find that all impacts, including traffic, hazards, or safety impacts, would be less than significant or less than significant with appropriate mitigation. (Draft Findings, dated September 2019, p. 18.)
- The February 5, 2020 Staff Report opined as to orientation of the driveways for the project: (1) driveway standards do not represent an objective health and safety standard and (2) the driveway spacing does not in fact “represent a specific adverse impact upon the public health or safety” per the opinion of the City’s Traffic Engineer. (February 5, 2020 Staff Report, p. 2.)
- The March 9, 2020 Staff Report concluded: “staff is not currently aware of sufficient facts to support valid findings that the project would create a specific adverse impact to the public health or safety standards, policies, or conditions.” (March 9, 2020 Staff Report, p. 8 [¶ 2].) Further: “Therefore, the City Council essentially must approve the project as currently presented, due to the application of State Housing Laws, including the HAA.” (March 9, 2020 Staff Report, p. 9.)
- At the most recent hearing on the matter, the City’s Attorney indicated that the staff report accurately portrayed the evidence in the record, that safety concerns previously raised had been addressed, and that any other concerns raised at the hearing did not relate to objective, identified written public health or safety standards. (Video of Council Hearing, March 9, 2020, at 4:43.)
- The City’s Attorney concluded that the City could not, in any legally defensible manner, disapprove the project on the current record.

Nevertheless, the City Council seemed disinclined to approve the project based on aesthetic concerns and ambiguous concerns that the project is somehow not safe. HCD further cautions on one point not emphasized by the City’s Attorney on March 9, 2020: the weight of the evidence that must support any such finding. Before the City can

deny the project it must find—based on **a preponderance of the evidence**—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.

In most City actions, the City is tasked with making findings or determinations based on “substantial evidence.” This standard shows significant deference to the City as a decisionmaker. The California Environmental Quality Act, for instance, defines substantial evidence as “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.” (Cal. Code Regs., tit. 14, § 15384, subd (a); see also *Oduyale v. California State Bd. of Pharmacy* (2019) 41 Cal.App.5th 101, 122 [substantial evidence is sufficient, “relevant evidence a reasonable mind might accept as adequate to support a conclusion.”].)

Findings or determinations based on **a preponderance of the evidence** require more. The expression “preponderance of the evidence” does not suggest deference to the City factfinders. The City must find that the balance or the weight of the evidence supports its determination. The “preponderance rule requires evidence of such weight that, when balanced against that opposed to it, it has more convincing force.” (31 Cal. Jur. 3d, Evidence § 91.) “A preponderance of the evidence means evidence, which when weighed with contrary evidence, has more convincing force and the greater probability of truth.” (*City of Long Beach v. Workers’ Comp. Appeals Bd.* (2005) 126 Cal.App.4th 298, 314.)

It appears that, as of March 9, 2020, there is no such evidence in the City’s records.

Five-Hearing Limitation

Recognizing that housing development projects often get caught up in local review processes that last for years, the Legislature adopted a maximum five-hearing limitation on housing development projects. (Gov. Code, § 65905.5, subd. (a).) Local agencies must approve or deny the housing development projects at any of the five hearings allowed under the Housing Crisis Act and do so consistent with the timelines set out in the Permit Streamlining Act (PSA). (Gov. Code, § 65905.5, subd. (a); see also Gov. Code, §§ 65950, 65952, 65957, 65956.)

HCD understands the City’s position to be that the five-hearing limitation imposed by the Housing Crisis Act does not apply to this housing development project. The rationale appears to be that the limit does not apply because either (1) the application predates the Housing Crisis Act or (2) the project was not consistent with the general plan and zoning standards in effect at the time an application was deemed complete in 2017. HCD is not privy to the City’s precise rationale, only to the statements that the City’s Attorney made on the record of at the City’s March 9, 2020 hearing on the project.

The City is mistaken about the applicability of the five-hearing limitation. The purposes of the Housing Accountability and Housing Crisis Acts, and this provision, in particular, were to encourage the expeditious processing and approval of housing development projects. The Legislature specifically found, for instance, that the State of California is experiencing a housing supply shortage of crisis proportions and declared a statewide housing emergency until 2025, suspending certain restrictions on development of new housing during that period. (Housing Crisis Act of 2019, Stats. 2019, ch. 654, § 2(a)-(b).) Rules that were not suspended are to be interpreted and applied in a manner that facilitates housing development. (See, e.g., Gov. Code, § 65589.5, subd. (a)(2)(L).) The Housing Crisis Act itself is to be “interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing.” (Gov. Code, § 65589.5, subd. (a)(2)(L).)

Given these Legislative purposes, and the limited period of the declared crisis, it is HCD’s opinion that the five-hearing limitation applies to all applications under review or submitted after the Housing Crisis Act’s effective date of January 1, 2020. After that day, a local agency “shall not conduct more than five hearings pursuant to Governor Code Section 65905” (Gov. Code, § 65905.5, subd. (a)) for any proposed housing development projects whose application has been deemed complete.

Reviewing documents in the record for this housing development project, we note the City has held at least six hearings on the project; it has held four hearings in 2020 alone, the Council’s March 8, 2020 hearing being the fourth. We understand that the Council has continued the matter tentatively until August 2020. As that will be the fifth hearing of the City for the project in 2020, it is HCD’s opinion that Council must approve or deny the project at that hearing in order to comply with the Housing Crisis Act.

Resumption of Land Use Hearings

One other point bears mentioning. The City Council originally continued this matter from March 8 to April 6, 2020. Given the COVID-19 public health crisis, the April 6 meeting was cancelled, and the hearing for this project continues to be postponed – first to June, then July, and now tentatively for August – resulting in at least a 4-month delay from the March 8 hearing. City staff have informed HCD that the Council is not hearing land use public hearings now, and the City Council’s June 2020 agenda similarly stated that land use hearings have been postponed, seemingly indefinitely:

PUBLIC HEARINGS: ALL LAND-USE PUBLIC HEARINGS ARE POSTPONED
DUE TO THE COUNTY STAY WELL AT HOME ORDER AND TO ENSURE AN
APPROPRIATE OPPORTUNITY FOR PUBLIC INPUT.

(City of Simi Valley, City Council Agenda, June 29, 2020, Item 4.)

HCD understands that that these are difficult times and many jurisdictions are scrambling to determine how to conduct business under these circumstances. HCD stands ready to assist the City in identifying the practices or technology that will facilitate the City's resumption of its duties in this area. HCD is in contact with jurisdictions across the state that are conducting hearings currently under the crisis and can draw from those experiences to assist the City. While HCD appreciates the City's difficulties, HCD emphasizes that the need for housing is even greater under these circumstances. The City needs to resume its land use hearings as soon as possible. Postponing land use hearings indefinitely is tantamount to a housing moratorium, which is expressly prohibited under the Housing Crisis Act.

Failure to comply with the Housing Accountability and Housing Crisis Acts, among other parts of housing law that were outlined herein and in HCD's December 16, 2019 and February 3, 2020 letters, may be grounds for enforcement action by the state. HCD continues to support the City's approval of the Tapo-Alamo project to ensure compliance with state law. HCD encourages the City to achieve its housing objectives. Please contact Shannan West, of our staff, at Shannan.West@hcd.ca.gov, with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read 'Megan Kirkeby', with a small dot at the end.

Megan Kirkeby
Acting Deputy Director