



2108 N Street #6930 | Sacramento, CA 95816

February 20, 2024

via email

The City of Sausalito, c/o Brandon Phipps, bphipps@sausalito.gov

Re: Comment on Draft EIR for Sausalito's Housing Element Programs

Dear Brandon:

Yes In My Back Yard appreciates the chance to comment on the City's Draft Environmental Impact Report ("DEIR") for the Sausalito Housing Element Programs Project.

I. Introduction

The current DEIR was not at first scheduled to be drafted "[f]ollowing adoption of the Housing Element." (DEIR, at p. ES-2.) The City stated in its General Plan EIR of January 28, 2021, that "[t]he Housing Element Update and any associated land use changes w[ould] be evaluated in a separate CEQA document, which w[ould have] be[en] forwarded to the City Council for consideration no later than January 2023." (Gen. Plan EIR, at pp. 2-55, -214.) This plan might have accorded with the City's statutory deadline of January 31, 2023, to revise its housing element in compliance with the Housing Element Law. (See Gov. Code §§ 65580 *et seq.*) But as you and I know, the housing element fell behind schedule, and so did the housing element EIR. That in turn motivated the City government to "decouple" the housing element from the CEQA process, in a panic to create the appearance of compliance and stymie developers from invoking the Housing Accountability Act's so-called "builder's remedy" (Gov. Code § 65589.5(d)) to entitle 20-100% affordable housing development projects by right in Sausalito.

Our organization, YIMBY Law, sued the City shortly thereafter. *Yes In My Back Yard v. City of Sausalito*, No. CIV2300652 (Super. Ct. Marin County filed Mar. 8, 2023). We pled three claims:

- improper reliance on CEQA's "common sense exemption" (14 Cal. Code Regs. ["CEQA Guidelines"] § 15061 (b)(3)) to excuse environmental review of the housing element;
- inadequate housing-element site inventory (Gov. Code §§ 65583, 65583.2); and
- removal of Ordinances 1022 and 1128 as constraints on the City's ability to accommodate its regional housing need allocation (Gov. Code §§ 65583(c)(3), 65587(d)(2)).

We continue to litigate all three of these claims in court. We maintain for present purposes that the potential for direct and indirect physical changes in the environment was apparent and reasonably foreseeable on January 30, 2023, when the City Council voted to adopt the housing element. Nothing in this comment letter shall be construed to waive that argument.

II. Project Description

It is a fiction that the CEQA “project” under environmental review here is “the implementation of the . . . Housing Element,” rather than the Housing Element itself. (Contra DEIR, at p. 2-1.) Even the City, by invoking CEQA’s common sense exemption last year, had to concede that the housing element is a “project.” (See CEQA Guidelines § 15061(b)(3); *id.* § 15378(a)(1) [“the whole of an action” with potential for physical change in the environment, including a general plan element, is a “project”]; Notice of Exemption (Jan. 31, 2023), at p. 1 [“The Project is an update to the Housing Element of the City of Sausalito General Plan.”].)

The City erred as a matter of law when it claimed that the Housing Element was covered by the common sense exemption. The CEQA Guidelines state that the common sense exemption applies to activities “[w]here it can be seen *with certainty* that there is *no possibility* that the activity in question may have a significant effect on the environment.” (§ 15061(b)(3) [italics added].) But the City claimed at the time only that “there is no substantial evidence that the 6th Cycle Housing Element may have a significant effect on the environment.” (Notice of Exemption, at p. 3.) But as the Supreme Court of California explained in *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2007) 41 Cal.4th 372, 380–81, that would mean that “the [City] must prepare a ‘negative declaration’ that briefly describes the reasons supporting its determination.” Instead, the City declared the housing element exempt from environmental review. This violated CEQA.

Now that the City has drafted an EIR, it struggles to rationalize the City’s decision to skip environmental review when it voted to adopt the Housing Element. California’s courts “have expressly condemned this use of EIR’s.” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 394.) “CEQA requires that an agency determine whether a project [requires] an EIR . . . *before* it approves that project,” the better to inform decisionmakers at the time—not after—they vote to approve a project such as the Housing Element. (*Ibid.* [quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 79].)

Finally, we note that the City’s project description (DEIR, ch. 2) raises many of the same concerns as our pending challenge under the Housing Element Law. The City emphasizes, for example, that the Housing Element “did not implement specific changes to existing land use controls . . . that may be necessary to accommodate [724 homes].” (*Id.*, at p. 2-2.) Yet “modification to existing land use controls,” as necessary, is the central purpose of making a cyclical revision to a housing element. (*E.g.*, Gov. Code §§ 65583, 65583.2.) If “specific information regarding [such] modification . . . was not available at the time the Housing Element was adopted” (DEIR, at p. 2-2), that’s the City’s fault—not least because, as far as we are informed, “the City Council did not have a written housing element on January 30 [2023] when it voted to adopt.” (*Yes In My Back Yard, supra*, Verified Petn. at ¶¶ 146–48, 199.) It’s a problem, under the Housing Element Law, that the City *cannot* meet its lower-income housing need allocation without repealing two constraining ordinances by a ballot measure that might not pass. (DEIR, at pp. 2-15 to -16, -19.)

Regardless, the modifications contemplated by programs 4, 8, 16, and 19 were so contemplated when the Housing Element was adopted. We turn now to the reasonably foreseeable physical changes in the environment that the Housing Element (including its programs) might bring about.

III. Environmental Impact Analysis

CEQA’s “guiding criterion” is “the long-term protection of the environment.” (Pub. Resources Code [“CEQA”] § 21001(d).) The public has learned a great deal about the environment since CEQA was enacted in 1970, and there’s now consensus that greenhouse gas emissions threaten the global environment more than anything else. This makes greenhouse gas emissions far more important than aesthetics, to name one overregulated impact, and that has consequences for environmental planning in Sausalito. Being such a short ride from San Francisco by bike, bus, or ferry—not to mention the many attractions in Sausalito itself—Sausalito is uniquely well-located for new housing with respect to greenhouse gases. Unfortunately, the Housing Element doesn’t plan for nearly enough housing.

It is reasonable to foresee that a shortage of housing in Sausalito may induce added demand for housing at the geographical margins of the Bay Area. This is called “displaced development,” and it’s within CEQA’s regulatory purview. (See *Muzzy Ranch*, *supra*, at p. 383.) When people live farther away from the places they need and want to go, they must travel farther to get to those places, and for the foreseeable future, this will often translate to more greenhouse gas emissions. “[Z]ero-emission vehicles,” by the way, “are not enough to solve the climate crisis”: “total vehicle miles driven” must fall 30 percent by 2045. Cal. Air Resources Bd., *2022 Scoping Plan*, app. E at pp. 4–5, <https://ww2.arb.ca.gov/sites/default/files/2022-11/2022-sp-appendix-e-sustainable-and-equitable-communities.pdf>. “Failing to plan for housing in Sausalito is thus planning for sprawl and other growth-inducing impacts to the Bay Area.” (*Yes In My Back Yard*, *supra*, Verified Petn. at ¶ 240.)

Yet “displaced development” doesn’t figure into the DEIR apparently at all, even as the City recognizes that “the impact of GHG emissions on the environment is potentially significant.” (DEIR, at p.3.7-34.) The DEIR’s analysis of greenhouse gas emissions explains GHGs’ climate-change link (DEIR, at pp. 3.7-1 to -6), as well as their regulatory setting (*id.*, at pp. 3.7-7 to -21). Like our verified petition, the DEIR cites the Air Resources Board’s *2022 Scoping Plan* as “an authoritative substantial evidence source in evaluating post-2020 GHG impacts.” (*Id.* at p. 3.7-30.) But then—for all three potential impacts the DEIR identifies with respect to greenhouse gas emissions—the City concludes that its Housing Element programs “will have a **less-than-significant impact**.” (*Id.* at pp. 3.7-27 [regarding direct and indirect GHG impact of development “facilitated by the Housing Element Programs”], -34 [regarding GHG impact of conflicts between such development and “applicable plan[s], polic[ies], [and] regulation[s]”], -35 [regarding cumulative GHG impact of such development].) The City appears to rely mostly on an analysis of its “operational GHG emissions from buildout of the Housing Element” (*id.* at p.3.7-26), which serially cites:

- a projection for 2040 based on “the CalEEMod model”
- “the City’s current General Plan” policies and programs;
- the “2022 California Building Standards”;
- “the California Green Building Standards Code”; and
- “CEC estimates” of the CalGREEN code’s impact

in support of the City’s conclusion that the direct and indirect GHG impact of its Housing Element (Programs) will be “less than significant,” obviating any need for mitigation. (See *id.* at pp. 3.7-26 to -27.) But it’s real-world GHG emissions—which are generated today in substantial part by personal transportation, which has nothing to do with green building standards—that really matter. Likewise, the ARB’s 2022 *Scoping Plan* recognizes that “[m]any of California’s cities, towns, suburbs, and rural areas were designed and built primarily around car travel,” which “has facilitated more car dependence and, ironically, more congestion, with resulting increases in vehicle miles traveled (VMT) and greenhouse gas (GHG) emissions.” (2022 *Scoping Plan*, *supra*, app. E at pp. 3-4. But see DEIR, at pp.3.7-29 to -33 [arguing that the 2022 *Scoping Plan*—if not its Appendix E on Sustainable and Equitable Communities—sets forth “main programs” with which the Housing Element Programs “would be consistent”].)

Obviously, “[c]limate change is an inherently cumulative issue.” (DEIR, at p. 3.7-34.) The City is correct that “GHG emissions related to the Housing Element . . . are not confined to a particular air basin but are dispersed throughout the Bay Area and beyond.” (*Id.* at p. 3.7-35.) But the City is wrong to claim that such GHG emissions are “less than significant.” (Contra *ibid.*) Lack of housing in Sausalito necessitates housing somewhere farther from San Francisco, and that in turn necessitates greater greenhouse gas emissions. And greenhouse gases’ impact on the physical environment, being a global matter of human survival, is more significant than any local impact that the Housing Element could have on Sausalito’s aesthetic. It’s past time to treat environmental review as an argument *for* urban housing. The City has so far failed here.

The DEIR reserves its more meaningful GHG analysis—that of VMT—for its section on “existing and projected transportation conditions.” (*Id.* at p. 3.14-1.) The problem here is the City’s failure to “reasonably reflect evolving scientific knowledge,” which would now prioritize the reduction of greenhouse gas emissions over just about anything else. (CEQA Guidelines § 15064.4(b).) Let’s agree that the afternoon traffic out of Sausalito, on northern Bridgeway toward the 101, is terrible. Traffic is personally inconvenient, but it’s still worse for the environment *because of* its greenhouse gas emissions. So it’s imperative to analyze traffic in terms of VMT rather than “LOS and congestion-related measures.” (DEIR, at pp. 3.14-16 to -17.) So what, then, compels the City to stress that it “will continue to assess traffic impacts outside of CEQA as part of the entitlement process”? (*Ibid.*)

With no substantial evidence to justify the apparent contradiction, the City maintains at once that its Housing Element Programs will *not* conflict with CEQA Guidelines § 15064.3 [transportation impacts] “in conjunction with cumulative development,” yet *would* conflict with that same guideline inherently. (Compare DEIR, at pp. 3.14-19 to -22, with *id.* at pp. 3.14-24 to -25.) Cumulatively, the City concedes that both residential VMT and VMT per employee will remain “above the [relevant] significance threshold[s],” and that those significant impacts are “unavoidable” (due to uncertainty) and should be mitigated according to the same mitigation measure for noncumulative impacts. (*Id.* at p. 3.14-25.) Regarding noncumulative impacts, the City again admits that both residential VMT and VMT per employee will exceed the applicable significance thresholds, even after the Housing Element is implemented as currently authorized. (*Id.* at p. 3.14-19.) As mitigation, the City proposes to “[s]ubsidize transit passes” and even

“[r]educe parking supply,” but doesn’t consider the VMT value of legalizing housing to the extent the local market would support it. This is a failure of environmental planning, and we call on the City to get out of urban housing’s way.

IV. Alternatives

We read the City’s proposed alternatives to concede the potential for its Housing Element to cause direct physical change in the environment. We have several points in response here.

First, we doubt that Opportunity Site 68 (2320/2330 Marinship Way), which “houses two 3-story office buildings and a large private surface parking lot,” was excluded from the City’s site inventory “due to the adjacency of the heavy industrial uses to the north of the property.” (*Id.* at p. 4-4.) If that were true, then sites 72, 211, and 303, which are adjacent to the same “heavy” industrial uses—I have walked around the Marinship too, and didn’t find the neighborhood especially “heavy”—should have been excluded as well. Obviously, they weren’t. Site 68 was removed due to community opposition, which can’t preempt the Housing Element Law.

Second, it’s error to present the “No Project” and “Removed Sites” as *good* on balance for the environment. (DEIR, at pp. 4-5 to -8 to -13.) For one thing, State law mandates the cyclical revision of the Housing Element. (Gov. Code § 65588.) For another, *less* housing (in Sausalito) is *bad* for the environment. (See *supra* Part III.) Less housing in the center of a metropolitan region requires more housing at its geographical margins. It’s a conceptual error to analyze alternatives as if less housing (again in Sausalito) might be less impactful, because unless the Bay Area ceases to be a world-class economic center, an enforced shortage of housing in Sausalito will require would-be Bay Area residents to seek out housing in Napa and Vallejo. That will increase VMT, and that’s a change in the physical environment.

Third, the “Removed Sites” and “Different Sites” alternatives underscore our concerns about the viability of the underlying Housing Element. If “Opportunity Sites located in high-risk landslide hazard areas” ought to be “removed from the list of potential sites to be implemented [for higher capacity] by the Housing Element Programs,” then *why aren’t they?* (DEIR, at p. 4-9.) Landslide is a physical effect on the environment, and it would be unconscionable for the City to shunt needed housing onto steep sites in a scheme to resist development on viable, relatively flat sites. And if site 67 might accommodate development in an otherwise built-out City, then *why wasn’t it included?* (*Id.* at pp. 4-13 to -14.) The intuitive answer is that the relevant sites were ill considered by the City Council for the final Housing Element. We recognize that the decision before the City was a complicated one, but that’s the point of CEQA. All these impacts should have been evaluated before the Housing Element was adopted.

Finally, the sole mitigation measure for the Housing Element’s hydrology impact (*id.* at pp. 3.9-20 to -22) appears vague. Mitigation measures must be feasible, enforceable, and specific to the extent possible. By what standard does the City propose to require “[f]inancial security” to ensure temporary control of stormwater pollution? (*Id.* at p. 3.9-21.) What standard would “the authorized enforcement official” observe in issuing stop-work orders? (*Ibid.*) The City’s mitigation efforts here seem intended to consolidate land-use power, rather than permit needed housing.

* * *

We welcome the City’s tentative progress toward compliance with CEQA, and urge that displaced development is the most important reasonably foreseeable environmental impact of a Housing Element that fails to accommodate Sausalito’s regional housing need allocation. We urge an EIR for “the whole of [the] action” (CEQA Guidelines ¶ 15378(a))—*i.e.*, the entire Housing Element, not just its programs—that accounts for the environmental benefits of more housing in Sausalito.

Cordially,



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