



FEE PAID: \$150 *J. Hendry*  
DATE: 07/31/2015 *8/3/15*

**TO THE RICHMOND CITY COUNCIL:**

The undersigned hereby appeals decision:

By the Planning Commission

By the Design Review Board

Denial  of:

Approval  of:

Variance (V)

Tent Subd. Or Parcel Map (TM)

Conditional Use Permit (CUP)

Rezoning (RZ)

Design Review Permit (DRP)

EIR Decision (EIR)

Other CEQA Exemption - Class 32 (In-fill Development)

**DESCRIBE ITEM AS PRINTED ON PLANNING COMMISSION or DESIGN REVIEW BOARD**

**AGENDA:**

Public hearing to consider a request for a Design Review Permit to construct a new mixed-use development consisting of 180 residential units and ±4,000 square feet of commercial space at ground floor on a 2.27 acres site located at the northwest corner of Hilltop Mall Road and Garrity Way...

**STATE REASONS FOR APPEAL:**

The grounds for this appeal are set forth in Richmond Residents for Responsible Development's July 22, 2015 comments on the Hilltop Apartments Project, which are attached and fully incorporated herein.

We further base this appeal on the Project's violation of CEQA, including unlawful exemption and traffic and air quality issues.

**DELIVER OR MAIL TO:**

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Print Form

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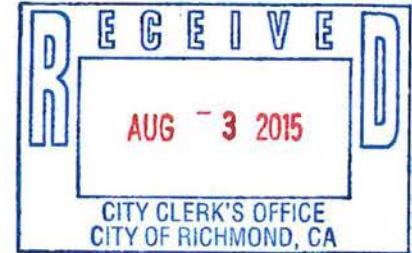
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July 22, 2015

VIA HAND DELIVERY

Richmond Design Review Board  
c/o Hector Lopez, Senior Planner  
City of Richmond Planning Division  
450 Civic Center Plaza, 2nd Floor  
Richmond, CA 94804



**Re: Richmond Design Review Board July 22 Agenda Item 1,  
Hilltop Apartments Project (APN: 405-303-012)**

Dear Chairperson Whitty and members of the Design Review Board:

We write on behalf of **Richmond Residents for Responsible Development** regarding the Hilltop Apartments Project located at 3080 Hilltop Mall Road ("Project"). The Project would involve the construction of a new mixed-use development consisting of 180 residential units and  $\pm 4,000$  square feet of ground floor commercial space on a 2.27-acre site. As explained in this letter, the Project does fails to comply with a number of requirements of the City of Richmond Zoning Ordinance, and fails to meet the standards required for issuance of a Design Review Permit. In addition, approval of the Project as currently proposed would violate the California Environmental Quality Act ("CEQA"). Therefore, the Design Review Board ("DRB") may not lawfully approve the Project until the deficiencies discussed below are corrected.

**I. Interest of Richmond Residents for Responsible Development**

Richmond Residents for Responsible Development ("Richmond Residents") is an unincorporated association of individuals and labor organizations that may be adversely affected by the potential impacts associated with Project development. The coalition includes **Timothy Doyle, Donald Drown, Fynrare Fletcher, the International Brotherhood of Electrical Workers Local 302, Plumbers and**

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**Steamfitters Local 159, Sheet Metal Workers Local 104, and their members and their families** who live and/or work in the City of Richmond and Contra Costa County.

The individual members of Richmond Residents live, work, and raise their families in the City of Richmond. They would be directly affected by the Project's impacts. Individual members may also work on the Project itself. They will therefore be first in line to be exposed to any health and safety hazards that may exist on the Project site.

The organizational members of Richmond Residents also have an interest in enforcing the City's planning and zoning laws and the State's environmental laws that encourage sustainable development and ensure a safe working environment for its members. Environmentally detrimental projects can jeopardize future jobs by making it more difficult and more expensive for business and industry to expand in the region, and by making it less desirable for businesses to locate and people to live there. Indeed, continued degradation can, and has, caused restrictions on growth that reduce future employment opportunities. Finally, Richmond Residents' members are concerned about projects that present environmental and land use impacts without providing countervailing economic and community benefits.

## **II. The Project is Inconsistent with the Zoning Ordinance**

As acknowledged in the Project's Staff Report, the City's Zoning Ordinance establishes various development standards that would apply to the Project, including Residential Density, Floor Area Ratio, and Common Open Space. As currently proposed, the Project conflicts with each of these Zoning Ordinance requirements. The Project is zoned C-3 (Regional Commercial District), which permits the same residential use as the MFR-2 (Medium-Density Residential). Under C-3 and MFR-2, Residential Density maximum is 79 units (1,250 square feet per unit),<sup>1</sup> the Floor Area Ratio limit is 2%,<sup>2</sup> and the Common Open Space requirement is 44,800 (200 square feet per single unit plus 100 square feet for additional units).<sup>3</sup> The

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<sup>1</sup> Zoning Ordinance §15.04.150.050.

<sup>2</sup> Zoning Ordinance § 15.04.230.050.

<sup>3</sup> Zoning Ordinance § 15.04.150.050.

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corresponding numbers for the proposed Project are 180 units, 3.3%, and 26,187, respectively. Clearly these numbers are not even close to complying with the Zoning Ordinance.

The Staff Report notes that the City's General Plan designates the Project area as High-Intensity Mixed-Use (Major Activity Center) and states that "given that the General Plan allows up to 284 units, a 79-unit project would be considered a medium density type of project and too low of a density for a major activity center." The Staff Report then concludes that "[b]ased on the existing Zoning Ordinance, there is no 'best-fit' zoning district that meets the intent of the General Plan," thus the Staff Report applies the MFR-4 (Multi-family Very High Density) designation as a comparison, rather than MFR-2. However, in the General Plan's discussion of High-Intensity Mixed-Use designations, it states that "Medium-Intensity Mixed-Use (Commercial Emphasis) is allowed within this land use designation."<sup>4</sup> That designation allows both commercial and residential development, but limits Residential Density to 50 units per acre and Floor Area Ratio to 2%. Therefore, the Staff Report's conclusion that medium density development is "too low" for the Project area is not supported by the record.

Nevertheless, even if the MFR-4 designation was applied, the Project would still not comply with the Zoning Ordinance, as acknowledged in the Staff Report.<sup>5</sup> MFR-4 limits are 132 Residential Density units, 2% Floor Area Ratio, and 26,800 square feet of Common Open Space.<sup>6</sup>

The Staff Report argues that because the General Plan allows a higher Residential Density (up to 284 units) and Floor Area Ratio (up to 5%)<sup>7</sup> than the zoning designation,<sup>8</sup> there is a conflict between the General Plan and Zoning Ordinance; thus "state law provides that the General Plan prevails." Therefore, the Staff Report concludes that the Residential Density and Floor Area Ratio are "governed by the General Plan rather than the Zoning Ordinance." The Staff

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<sup>4</sup> General Plan, p. 3.17.

<sup>5</sup> Staff Report, PDF p. 8.

<sup>6</sup> Zoning Ordinance §§ 15.04.170.050, 15.04.230.050.

<sup>7</sup> The General Plan states in a footnote on page 3.15 that "[f]loor area ratio (FAR) denotes building intensity for non-residential uses." Thus, it is unclear if the ratios provided in the General Plan would even apply to this Project.

<sup>8</sup> General Plan, p. 3.17.

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Report provides no legal authority, other than a vague reference to “state law,” for its contention that the Zoning Ordinance is not applicable to Residential Density and Floor Area Ratio.

The Staff Report does not appear to acknowledge the discrepancy at all between the Zoning Ordinance requirements for Common Open Space and the proposed Project. Thus, even if the Zoning Ordinance requirements for Residential Density and Floor Area Ratio were not applicable to this Project, the Project still would not be in compliance with the Zoning Ordinance due to the lacking Common Open Space.

Although Cal. Gov. Code § 65860 requires that the Zoning Ordinance be consistent with the General Plan, it does not specify that a Zoning Ordinance enacted *before* a General Plan is inapplicable if inconsistent, only that “[i]n the event that a zoning ordinance becomes inconsistent with a general plan by reason of amendment to the plan, or to any element of the plan, the zoning ordinance *shall be amended within a reasonable time* so that it is consistent with the general plan as amended.”<sup>9</sup> Thus, the remedy for the apparent inconsistency is not to ignore the zoning designation, but to implement a Zoning Ordinance amendment. If the City does not amend the Zoning Ordinance, it cannot simply make the determination that the Zoning Ordinance is inapplicable, particularly when the City relies on that determination for its design review findings and its CEQA determination.

As discussed further below, the law clearly requires the Project to be in compliance with the Zoning Ordinance in order for it to move forward, both under the Ordinance itself and under CEQA.

### **III. The Project Does Not Meet the Criteria for a Design Review Permit**

Under Section 15.04.930.110 of the Zoning Ordinance, the DRB must make specific findings in its review of a permit application, including that “the design of the proposed project is in accordance with the general plan of the City of Richmond *and all applicable provisions of the zoning ordinance.*”<sup>10</sup> For this required finding, the Staff Report merely concludes that the criterion is satisfied, stating that the

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<sup>9</sup> Cal. Gov. Code § 65860(c)(emphasis added).

<sup>10</sup> Zoning Ordinance §15.04.930.110 (emphasis added).

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“proposed project is an allowed land use activity under the General Plan.” The Staff Report does not adequately discuss the inconsistency with the Zoning Ordinance in conjunction with the required finding.

As described above, the Project does not comply with the Zoning Ordinance because it is inconsistent with its requirements for Residential Density, Floor Area Ratio, and Common Open Space. Therefore, the DRB cannot lawfully make this finding until the Project comes into compliance with the Zoning Ordinance, or the Zoning Ordinance is amended.

#### **IV. The Project is Not Categorically Exempt from CEQA**

City planning staff has improperly determined the Project to be categorically exempt under CEQA Guidelines Section 15332 (Infill Development). Under this exemption, the Project must be “consistent with the applicable general plan designation and all applicable general plan policies *as well as with applicable zoning designation and regulations.*”<sup>11</sup> The language is clear that the Project does not fit into this Categorical Exemption if it does not comply with both the General Plan and the Zoning Ordinance. As it currently stands, the Project does comply with the General Plan, because the language in the General Plan merely allows, but doesn’t require, *up to* 284 units and *up to* a 5% Floor Area Ratio. However, the Project fails to comply with the Zoning Ordinance. CEQA does not provide for an exception to this rule, regardless of any perceived inconsistency between the General Plan and the Zoning Ordinance.

Therefore, the Project as proposed is not categorically exempt from CEQA because it does not comply with the Zoning Ordinance. The City must either prepare the proper environmental documentation under CEQA, or bring the Project in compliance with the categorical exemption requirements by changing the Project or amending the Zoning Ordinance. If the City fails to take one of these actions, it may not lawfully approve the Project under CEQA.

#### **V. Conclusion**

The Project does not comply with the Zoning Ordinance requirements for Residential Density, Floor Area Ratio, and Common Open Space. Thus, the DRB

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<sup>11</sup> CEQA Guidelines Section 15332 (emphasis added).

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cannot make the required findings under the Zoning Ordinance for issuing a Design Review Permit. In addition, the Project's inconsistency with the Zoning Ordinance renders it ineligible for the Infill Development Categorical Exemption. Therefore, the Project does not comply with CEQA. For all these reasons, the DRB may not lawfully approve the Project. Thank you for your consideration of these comments.

Sincerely,

/s/

Laura E. Horton

LEH:lj1