



**TOWN OF LOS GATOS**  
**OFFICE OF THE TOWN ATTORNEY**

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**MEMORANDUM**

**To:** Planning Commission  
**From:** Robert Schultz, Town Attorney  
**Date:** September 18, 2020  
**Subject:** The Role of the Planning Commission and the Applicability of the Housing Accountability Act and By Right Development to the Application for Modification to an Existing Architecture and Site Application (S-13-090) to Remove Underground Parking for Construction of a Commercial Building (Market Hall) in the North 40 Specific Plan Area.

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The Planning Commission at their last meeting requested further analysis of the applicability of the Housing Accountability Act to the Application for Modification to an Existing Architecture and Site Application (S-13-090) to Remove Underground Parking for Construction of a Commercial Building (Market Hall) in the North 40 Specific Plan Area (Phase 1 Modification Application). This memorandum addresses the Role of the Planning Commission in addition to the applicability of the Housing Accountability Act and the Town's Housing Element/ By Right Development to the Phase 1 Modification Application.

**Role of the Planning Commission**

Based upon the questions and comments put forth by the Planning Commissioners at the last meeting, I thought it would be important to first review the role of the Planning Commission as it relates to all land use decisions.

The Planning Commission acts on behalf of the Town Council in deciding on and recommending land use activities and related matters. The Planning Commission derives its authority and duties through California Government Code Section 65101. That authority is further detailed in the Los Gatos Town Code defining the composition and duties of the Planning Commission. One of the duties of the Planning Commission is to review individual projects for consistency with the General Plan, any applicable specific plans, the zoning ordinance, and other land use policies and regulations. The Planning Commission is required to evaluate the facts and information and then deliberate and determine how the applicable ordinance or law applies to the information provided.

Pursuant to the landmark case of *Topanga Assn. For A Scenic Community v. County of Los Angeles* (1974), the Planning Commission must explain land use decisions through the adoption of findings. Topanga defined findings as legally relevant sub-conclusions which expose the agency's

mode of analysis of facts, regulations, and policies, and bridge the analytical gap between raw data and ultimate decision. Therefore, the findings of the Planning Commission must be relevant to adopted, applicable criteria in statutes, ordinances or policies. In a way, The Planning Commission operates as a court in that the Planning Commission must apply the Town's local land use regulations to a specific application just as a court applies the law to a specific set of facts. Basically, the findings of the Planning Commission are an explanation of how they progressed from the facts through established fixed rule, standard, law, or policies to the decision.

Based upon the forgoing, and as I explained in our last meeting, findings such as the proposed modification is a "cost saving/profit increasing strategy" or that "they stand to make millions of dollars" or that the developers must "stick with their commitment" or "uphold the agreement" or that this is a "bait and switch" or "will force visitors, shoppers & residents to find parking elsewhere" or that the developers "are bullies and are ruining our town" are inadequate and improper findings pursuant to *Topanga Assn. For A Scenic Community v. County of Los Angeles (1974)*. Although all of these statements may not lack evidentiary support, they lack legal relevance and even if they are assumed to be correct, those findings simply do not meet the legal requirements set forth in code and case law.

### **Background of North 40 Phase 1 Project**

The approved North 40 Phase 1 Project includes: 260 residential condominiums/rowhomes, 10 rental apartments (including two live-work units), 49 affordable senior rental units, one additional unit to be reserved for a moderate-income manager of the senior units, and approximately 62,000 square feet of commercial floor area and a four-story parking garage with 303 parking spaces. The approved parking garage consisted of three above grade levels and one below grade level. The approved project subdivides the 20.7-acre Phase 1 project area into 113 lots to provide for 320 residential units and commercial space. (Phase 1 Project).

Prior to the approval, the Town Council denied the Phase 1 Project based on the Project's inconsistencies with the Town's General Plan, Housing Element, and Specific Plan. Thereafter, the applicants filed a lawsuit against the Town asserting that: (1) the Town of Los Gatos violated the Town's Housing Element; (2) the Town violated the State's Housing Accountability Act; and (3) the Town violated the State Density Bonus Law. The lawsuit requested the Court to direct "the Town to comply with its clear, mandatory, and ministerial duty to approve the project in compliance with the Town's Housing Element, the Housing Accountability Act, and the Density Bonus Law."

On June 9, 2017, the Santa Clara County Superior Court issued a Decision and Judgment against the Town. The Decision and Judgment determined that the findings adopted by the Town Council were discretionary determinations made under subjective policies in the Specific Plan, instead of under objective policies as required by the Housing Accountability Act.

On September 10, 2017, the Town Council rescinded its denial of the Phase 1 Project pursuant to the court order and approved the project as set forth above. The Applicants are now requesting a modification to the Phase 1 Project, (an existing and approved Architecture and Site Application), to remove the underground parking for the Market Hall. The removal of the below grade level would eliminate 127 parking spaces. No exterior modifications to the existing Market Hall building are proposed (Phase 1 Modification Application).

### **Applicability of Housing Accountability Act**

The Court Decision and Judgment directed the Town to reconsider the Project under the provisions of Government Code §65589.5(j) of the Housing Accountability Act (HAA). The HAA was originally enacted in 1982 and is often referred to as California’s “Anti NIMBY law.” The intent of the legislation was to address the “problems in some cases where local governments adopt housing policies and then fail to comply with their own policies when specific projects are at stake. The obvious problem is that when developers of housing cannot rely on housing policies in proposing projects, then substantial uncertainty is created.”

The HAA requires local governments to approve any “housing development project,” including specified mixed use projects, if they comply with “applicable, objective general plan and zoning standards and criteria, including design review standards, in effect at the time that the housing development project’s application is determined to be complete...” The Court Decision and Judgment determined that the Applicant’s “project is within the statutes definition of a housing development project.” Subdivision (j) of Section 65589.5 reads:

(j) When a proposed housing development project complies with applicable, objective general plan and zoning standards and criteria, including design review standards, in effect at the time that the housing development project’s application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by substantial evidence on the record that both of the following conditions exist:

- (1) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. 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.
- (2) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.

The HAA defines “objective” as “involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official.” (Gov. Code § 65589.5(h)(8).

Since the Decision and Judgment required the Town to consider the Phase 1 Project under the HAA, the HAA would certainly apply to any modifications to the Phase 1 Project. Therefore, in order to deny the Phase 1 Modification Application, the Planning Commission must cite to specific written objective identified Town Standards and Policies and cannot deny the Phase 1 Modification Application for subjective criteria. As explained in *Honchariw v. County of Stanislaus*, the HAA was intended to “take away an agency’s ability to use what might be called a ‘subjective’ development ‘policy’.

### **Applicability of Housing Element/By Right Development**

In addition to complying with the HAA, the Town must comply with Housing Element Law. Housing Element Law requires the Town to demonstrate how the community plans to accommodate its “fair share” of its regional housing needs. To do so, the Town must establish an inventory of sites designated for new housing that is sufficient to accommodate its fair share. The Town must also identify regulatory barriers to housing development and propose strategies to reduce or eliminate those barriers.

The Town’s Housing Element required adoption of the North 40 Specific Plan with certain development assumptions in order to meet existing and projected housing needs in the Town and to obtain certification of the Housing Element from the State. The Town’s Housing Element (Action HOU 1.7) required the Town to rezone 13.5 acres within the North 40 Specific Plan Area to comply with a minimum density of 20 units per acre and establish “by-right” development for these units. More specifically, the Town’s Housing Element states:

Additional opportunities for affordable housing are being facilitated through the consideration of the North 40 Specific Plan and associated rezoning of 13.5 acres with a minimum density of 20 units per acre to yield 270 units. The Specific Plan would provide certainty regarding objective criteria in the form of development standards and design guidelines that would be implemented through “by right development” in the consideration of Architecture and Site applications. This process involves site and architectural review and if a proposal meets the objective criteria in the Design Guidelines, then the project is approved. Therefore, the Planning application process and review is not an undue burden or constraint on the production of affordable housing.

Based upon the Town’s Housing Element, the approval of the Phase 1 Project and now this Phase 1 Modification Application are entitled to “by right” development. This means that pursuant to our Housing Element, the Planning Commission must only apply objective standards in its review, analysis, and determination on whether to approve or deny the Phase 1 Modification Application.

These are the same legal principles that are set forth under the HAA and are adopted in the Court's Decision and Judgment and restrict the Planning Commission from using subjective criteria and findings to condition or deny this Phase 1 Modification Application.

**Conclusion**

Under the Housing Accountability Act and Housing Element Law, the Phase 1 Modification Application may only be reviewed for conformance with objective Town standards and policies and the Planning Commission must apply those policies to facilitate the proposed housing development and must not use subjective standards or policies to deny the Phase 1 Modification Application.

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