

OAKLAND CITY COUNCIL
RESOLUTION NO. 84717 C.M.S.

Introduced by Councilmember _____

A RESOLUTION DENYING THE APPEAL OF CRADL AND CITIZENS4OAKLAND AND UPHOLDING THE CITY PLANNING COMMISSION'S CERTIFICATION OF AN ENVIRONMENTAL IMPACT REPORT AND APPROVAL OF A MIXED-USE PROJECT, CONSISTING OF 115 SENIOR HOUSING UNITS AND 3,446 SQUARE FEET OF RETAIL SPACE, AT 4311-4317 MACARTHUR BOULEVARD

WHEREAS, AMG & Associates ("Applicant") filed applications for Major Conditional Use Permits, Variances, Design Review, and California Environmental Quality Act ("CEQA") Review for the High and MacArthur Mixed-Use Project ("Project") on March 5, 2010; and

WHEREAS, the City, commencing in 2011, began preparing a CEQA document (a focused Draft Environmental Impact Report, hereafter referred to as a "DEIR"), published a Notice of Preparation for the DEIR on May 18, 2011, and held a Scoping Meeting before the Planning Commission for the DEIR on June 15, 2011, all in accordance with CEQA; and

WHEREAS, the Planning Commission conducted a duly noticed public hearing on the DEIR on December 5, 2012, and the 45-day public comment period on the DEIR closed on December 10, 2012; and

WHEREAS, the City received comments on the DEIR and prepared a Response to Comment Document/ Final EIR ("FEIR") to address the comments received during the 45-day comment period; and

WHEREAS, the FEIR was published on June 28, 2013, along with a Notice of Availability/Release of the FEIR, both of which were sent to the Appellants via their attorney; and

WHEREAS, on July 17, 2013, the Planning Commission conducted a duly noticed public hearing on the Project, closed the public hearing, certified and made appropriate CEQA findings for the EIR, and approved the Project, subject to findings and conditions of approval; and

WHEREAS, the Planning Commission found, in part, that (i) the issues raised in comments on the DEIR were adequately addressed in the FEIR; and (ii) the Project would: be consistent with both the applicable zoning designation and General Plan classification; redevelop a vacant (except for a billboard), blighted site with a mixed-use project providing a combination of senior housing and commercial space in the Laurel District; meet the General Plan goals of providing new housing

units and infill development on underused or vacant parcels on a site identified as a Housing Opportunity site in the City's Housing Element; enhance the area and be an addition to the surrounding neighborhood; result in the removal of an existing billboard and clean-up of existing hazardous material contamination; not create substantial adverse impacts; and meet the criteria for design review, conditional use permits to allow increased density for senior housing, a reduction in parking for senior housing, and ground-level parking and loading areas, and variances for increased height to enable the higher density senior housing; and

WHEREAS, as previously stated, both the 45-day public comment period on the Draft EIR and public hearing on the Project under Public Resources Code section 21177(a) were closed by the City Planning Commission and a decision on the Project was made by the City Planning Commission on July 17, 2013, and also a Notice of Determination for the Project was filed on July 18, 2013; and

WHEREAS, on July 29, 2013, the Commercial and Retail Attraction and Development for the Laurel (CRADL) and Citizens4Oakland ("Appellants") filed an appeal to the City Council challenging the Planning Commission's decision ("Appeal"); and

WHEREAS, on November 19, 2013, the City Council conducted a duly noticed public hearing on the Appeal, in part, under Oakland Planning Code sections 17.130.050, 17.134.040A1 and 17.134.070 and CEQA Guidelines section 15185 (and not a public hearing on the Project under Public Resources Code section 21177(a), nor a de novo hearing; rather, the hearing on the appeal was limited only to the Issues properly presented to the City Council, as stated below); and

WHEREAS, all interested parties were given the opportunity to participate in the public hearing on the Appeal in accordance with all applicable City procedures; and

WHEREAS, during the course of the public hearing the Applicant stated his intention that at least 20 (twenty) percent of the residential units shall be affordable; and

WHEREAS, the public hearing on the Appeal was closed by the City Council on November 19, 2013; now, therefore be it

RESOLVED, The City Council finds and determines, after having independently reviewed and considered the record and the EIR, that the responses to the DEIR public comments contained in the FEIR, as well as the staff report for the July 17, 2013 Planning Commission meeting and the City Council Agenda Report for the November 19, 2013 City Council meeting constitute substantial evidence that adequately address the issues raised by the Appellants; and be it

FURTHER RESOLVED, The City Council, having independently reviewed, heard, considered and weighed all the evidence in the record presented on behalf of all parties and being fully informed of the Applications, EIR, the decision of the Planning Commission, and the Appeal, hereby finds and determines that the Appellants have not shown, by reliance on appropriate/proper evidence in the record, that the Planning Commission's decision was made in error, that there was an abuse of discretion by the Planning Commission, and/or that the Planning Commission's decision was not supported by sufficient, substantial evidence in the record. This decision is based, in part, on the November 19, 2013 City Council Agenda Report, the July

17, 2013 Planning Commission staff report, and the EIR, all of which are hereby incorporated by reference as if fully set forth herein. Accordingly, the Appeal is denied, the Planning Commission's decision to adopt the above-referenced CEQA findings (including that the EIR was completed in compliance with CEQA and the certification of the EIR) and other required findings and approve the Project are upheld; and be it

FURTHER RESOLVED, That, in further support of the City Council's decision to deny the Appeal and approve the Project, the City Council affirms and adopts as its own independent findings and determinations (i) the November 19, 2013 City Council Agenda Report, including without limitation the discussion, findings, conclusions, conditions of approval (including the Standard Conditions of Approval/Mitigation and Monitoring Program ("SCAMMRP")) (each of which is hereby separately and independently adopted by this Council in full); and (ii) the July 17, 2013 Planning Commission staff report, including without limitation the discussion, findings, conclusions, conditions of approval and SCAMMRP (each of which is hereby separately and independently adopted by this Council in full); and be it

FURTHER RESOLVED, As a separate and independent basis, certain arguments, issues and/or evidence (hereafter Issues) raised in the Appeal and/or submitted after filing the Appeal are not properly before the City Council since they were not specifically raised (a) during the seventeen (17) day public comment period on the Project, up to and including the July 17, 2013 City Planning Commission hearing/decision on the Project; and/or (b) during the Draft EIR's 45-day public comment period and related to the current Project. The requirement to present any and all Issues during the aforementioned periods (and therefore limiting any appeal to such previously presented Issues) is provided for in (i) various notices/agendas for the Project, for which the Appellant had actual and construction notice; (ii) the City's Appeal Form (which has not been revised since May 2011); (iii) the City's July 22, 2013 decision letter on the Project; and (iv) various provisions of the Oakland Planning Code, including without limitation sections 17.130.050 (Presentation of written and documentary evidence); 17.134.040A1 (Procedure for Consideration of Major CUP at the Planning Commission hearing); and 17.134.070 (Appeal to City Council for Major CUP). Although the City Council is not legally obligated to consider Issues not properly before it, it has nevertheless considered them – without waiving any of its rights to object to the late/improper submittal of the Issues-- as detailed in the November 19, 2013 City Council Agenda Report and elsewhere in the record; and be it

FURTHER RESOLVED, As a further separate and independent basis, certain Issues raised during the Draft EIR's 45-day public comment period are also not properly before the City Council because they were written and submitted for an earlier (2008) project, not the current Project. Thus, Issues that were not raised on the adequacy of the current Project's DEIR but rather on the earlier project are by definition unrelated to the current Project's Draft EIR since they were prepared years prior to the release of the current Project's Draft EIR. Although the City Council is not legally obligated to consider Issues not properly before it, it has nevertheless considered them – without waiving any of its rights to object to the late/improper submittal of the Issues-- as detailed in the November 19, 2013 City Council Agenda Report and elsewhere in the record; and be it

FURTHER RESOLVED, The public hearing on the Appeal is not a de novo hearing -- in accordance with the Oakland Planning Code and the decision in *Mashoon v. City of Oakland*

(Appeal No. A077608; filed December 9, 1997; First Appellate District, Division Five); rather, it is limited only to the Issues properly presented to the City Council, as stated above; and be it

FURTHER RESOLVED, The City Council finds and determines that this Resolution complies with CEQA and the Environmental Review Officer is directed to cause to be filed a Notice of Determination/Exemption with the appropriate agencies; and be it

FURTHER RESOLVED, The record before this Council relating to this Resolution includes, without limitation, the following, as it relates to the current Project (and not the earlier, 2008 project):

1. the Applications, including all accompanying maps and papers;
2. all plans submitted by the Applicant and its representatives;
3. all staff reports, decision letters, and other documentation and information produced by or on behalf of the City, including without limitation the Draft and FEIR (collectively called "EIR") and supporting technical studies, all related and/or supporting materials, and all notices relating to the Applications and attendant hearings;
4. all oral and written evidence properly received by City staff, the Planning Commission, and the City Council before and during the public hearings on the Applications, as stated above;
5. all matters of common knowledge and all official enactments and acts of the City, such as (a) the General Plan; (b) the Oakland Municipal Code; (c) the Oakland Planning Code; (d) other applicable City policies and regulations; and (e) all applicable State and federal laws, rules and regulations; and be it

FURTHER RESOLVED, The custodians and locations of the documents or other materials which constitute the record of proceedings upon which the City Council's decision is based are (a) the Planning and Building Department, Planning and Zoning Division, 250 Frank H. Ogawa Plaza, Suite 3315, Oakland, California, and (b) the Office of the City Clerk, 1 Frank H. Ogawa Plaza, First Floor, Oakland, California; and be it

FURTHER RESOLVED, per standard City practice, if litigation is filed challenging this decision, or any subsequent implementing actions, then the time period for obtaining necessary permits for construction or alteration and/or commencement of authorized construction-related activities stated in Condition of Approval #2 is automatically extended for the duration of the litigation; and be it

FURTHER RESOLVED, The recitals contained in this Resolution are true and correct and are an integral part of the City Council's decision; and be it

FURTHER RESOLVED, that granting of this height variance will not set a precedent because variances are granted on a case-by-case basis and the Project does not change the existing zoning in the surrounding area that any subsequent developers are subject to for their properties. Nor

does granting the variances here mandate that the City grant a variance to another property in the Laurel District as any future land use application for a variance would be subject to the planning process outlined in the Planning Code, including notice, opportunity to comment on the proposal, possible public hearings before the Planning Commission, appropriate CEQA review and adoption of findings, supported by substantial evidence. Moreover, the Project (1) is consistent with the allowable density, floor area ratio, uses, and policies of the General Plan; (2) site has a unique location – being at the edge of the Laurel District, immediately adjacent to a freeway (necessitating a certain design to minimize receiving freeway noise and air pollution) and at the intersection of two major transit corridors; (3) site has an awkward triangular shape; (4) site is separated from any residential uses by the 580 Freeway as well as MacArthur Boulevard and commercial properties and the height of the Project will not negatively impact residences in the lower density residential zones; (5) entails senior housing and is therefore eligible for an increase in density, and an increase in density for this site can only be accomplished with the approval of height variances to achieve the desired number of units in order for the Project to be economically feasible; and (6) site occupies an entire block, thus further isolating it from other contiguous lots (as it is bounded on all sides by roadways); and be it

FURTHER RESOLVED, the Applicant has stated that the Project would be an “active” senior community, which is considered a Permanent Residential Activity pursuant to Oakland Planning Code (OPC) section 17.10.110, with a bonus density for senior housing pursuant to OPC section 17.106.060. Pursuant to Condition of Approval # 1, the Project shall be constructed and operated accordingly and any additional uses, if proposed, (such as Residential Care Residential Activities (OPC section 17.10.112), Service- Enriched Permanent Housing Residential Activities (OPC section 17.10.114), and/or Health Care Civic Activities (OPC section 17.10.220, which includes skilled nursing, extended care, residential care (including facilities licensed for six or fewer residents), and assisted living facilities, all of which provide medical care on site)) shall require, as applicable, a separate application and approval, subject to the planning process outlined in the Planning Code, including notice, opportunity to comment on the proposal, possible public hearings before the Planning Commission, appropriate CEQA review and adoption of findings, supported by substantial evidence. New Condition of Approval #20 is added to read as follows:

20. Marketing as “Active” Senior Community

Ongoing

All marketing, advertising and/or promotional materials – including without limitation brochures, Realty and Development Signs, media advertisements, website, applications, and the like – shall promote the “active” lifestyle of the Project and must use the word “active” in said materials;

and be it

FURTHER RESOLVED, new Condition of Approval #21 is added to read as follows:

21. Improved Retail Space

a. Prior to issuance of building permits

The Applicant shall make reasonable good faith efforts to make the retail space more functional (“Improved Retail Space”). The applicant shall either (a) provide the Planning

Director or designee with an explanation as to why it is not feasible to have Improved Retail Space; or (b) submit plans for such Improved Retail Space to the Planning Director or designee, pursuant to Condition of Approval # 3, who shall (i) determine if such plans constitute a minor or major change; and (ii) if a minor change, shall issue a final, non-appealable decision, after providing seventeen (17) days notice to Interested Parties . If it is a major change, then the change shall be submitted to the City Planning Commission for its consideration, which shall be the final decision-maker and issue a final, non-appealable decision, after providing seventeen (17) days notice to Interested Parties.

b.Ongoing

If the retail space is not occupied within thirty (30) days after the first residential unit is occupied, the Applicant shall demonstrate good faith efforts in leasing the retail space by providing a marketing study and plan to the City, and provide such every quarter thereafter until the retail space is occupied.

NOV 19 2013

IN COUNCIL, OAKLAND, CALIFORNIA, _____

PASSED BY THE FOLLOWING VOTE:

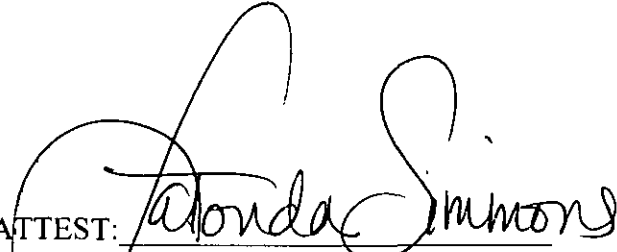
AYES - ~~BRUNO, GIBSON~~, GIBSON MCELHANEY, ~~KALB~~, KAPLAN, ~~REID~~, SCHAAF and PRESIDENT KERNIGHAN - 5

NOES - Brooks, Gallo - 2

ABSENT - 0

ABSTENTION - 0

Excused - Reid - 1

ATTEST: 

LaTonda Simmons
City Clerk and Clerk of the Council
For the of City of Oakland, California