Agenda Item #3
AGENDA DATE: 4/26/16
SUPPLEMENTAL # 1

From: Leslie Little
Sent: Tuesday, April 26, 2016 10:39 AM
To: Planning_Commission
Cc: Jenna Luna; Gina Paolini; Andrew Crabtree; Terry Linder; John Baty; Steve Golden; Elaine Collins; Tiffany Brown
Subject: FW: Memo to Planning Commission re Congregate Care Definition
Attachments: Memo to Planning Commission Morgan Hill re change in congregate care facility definition 4-25-16.docx

Follow Up Flag: Follow up
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Attached is a memo to the Planning Commission regarding proposed "Congregate Care" - Assisted Living continued public hearing on tonight's Agenda. The memo addresses several of the issues raised by the Planning Commission two weeks ago.

MEMORANDUM

TO: **Planning Commission, City of Morgan Hill**

FROM: **Gary M. Baum, Interim City Attorney**

DATE: **April 26, 2016**

RE: **City Authority to Amend Definition of Congregate Care Facilities in the Zoning Code ZA-16-03**

QUESTIONS PRESENTED:

1. **May the City amend the zoning code definition to change the definition of congregate care facilities citywide?**

2. **Is it legal for the City to change the definition of congregate care facilities for health, safety, or welfare reasons, if the change will affect an existing, unbuilt project, which does not have building permit issued for development?**

3. **Will the change of the definition of congregate care facilities result in a valid claim for a taking for the individual project owner?**

BRIEF ANSWERS:

1. **The City is permitted to change the zoning code definition of congregate care facilities citywide.**

2. **It is a legal exercise of the City's police power to change the definition of congregate care facilities for health, safety and welfare reasons even if it would affect an approved, but unbuilt project which does not have a building permit for development.**

3. **The developer of the facility affected by this zoning code change does not have a vested right in the current zoning definition of congregate care facilities for the unbuilt portion of his project.**

BACKGROUND:

On April 12, 2016, the Morgan Hill Planning Commission reviewed a request from staff to change the zoning code definition of 'congregate care' facilities citywide. The proposed definition includes a requirement that congregate care facilities obtain appropriate State licensing and comply with a number of State requirements for residential care facilities.

Currently, congregate care facilities are not subject to the Residential Development Control System ("RDCS") and can thus be built without competing for residential development allotments. This gap allows congregate care facilities to avoid the RDCS allotment system.

Congregate care facilities in Morgan Hill currently are not required to have State licenses and face rigorous State inspections. The City has determined that in the interests of protecting health, safety, and welfare of the occupants of the congregate care facilities and ultimately the public, it would be prudent to change the classification of congregate care facilities citywide to include the State license requirement.

One congregate care facility within the City has constructed two buildings within its project and still has the right to develop a third building within the confines of its property. As of today, the developer has not applied for a building permit for this final portion of the development.

Legal Analysis

The City has both the right and the obligation to protect the public's health, safety, and welfare. The City's power to regulate those interests is called the City's police power. Based upon the City's police power, the City may change the definition of congregate care facilities to incorporate State law and State requirements. State law is designed to protect the residents of congregate care facilities and to require certain services, amenities and protections for those residents. The current zoning code classification does not incorporate those requirements. The revision of the Morgan Hill zoning code will safeguard the public's health, safety, and welfare.

Local agencies are given land use planning authority or police power to shape their communities in both the federal and California constitutions. This is because land use planning and community development have far-reaching impacts on the general health, safety, and welfare of residents. Local authority to regulate land use derives from the police power — the prerogative to act to promote the health, safety and welfare of the community. The courts have held that a city's police power may be used to regulate a wide and expanding variety of activities as long as it is exercised in a manner that is reasonably related to the protection of the public's health, safety, and welfare, is not preempted by federal or state law, and is within the framework of state statute.

The California Supreme Court has a long history of confirming the right of a local agency to exercise its police power in the zoning sphere. In *Miller v. Board of Public Works of City of Los Angeles*, 195 Cal. 477 (1925), the developer plaintiffs obtained a building permit for the erection of four-family dwellings in residence district No. 20, where the developer's lot was located. Shortly thereafter, the permit was canceled and revoked by the board, because the City Council of Los Angeles was contemplating a comprehensive zoning plan, covering the entire city and that, as a part of that comprehensive zoning scheme, an ordinance would be enacted prohibiting the erection or construction of four-family flats in that part of the city where the developer's property was located. In fact, the City Council of Los Angeles passed an emergency ordinance which declared it to be unlawful to construct any building to be used for housing more than two families together in the district in which plaintiffs' property was located.

The developer sued. The court stated,

> The only defense interposed by the board to [developer's lawsuit] was the existence of the last-mentioned ordinance. The trial court held said ordinance to be a valid exercise of the police power of the municipality and denied the writ of mandate sought by the plaintiffs. From this judgment plaintiffs appeal. No point is made that the board has not the power to revoke a permit once it has been duly issued, nor that the ordinance, if valid, may not operate retroactively to nullify a permit previously issued.

The Court concluded that the city had acted appropriately within its power and rejected the developer's claims.

> The police power of a state is an indispensable prerogative of sovereignty and one that is not to be lightly limited. Indeed, even though at times its operation may seem harsh, the imperative necessity for its existence precludes any limitation upon its exercise save that it is not unreasonably and arbitrarily invoked and applied. [Miller pp 482-483]

In Miller court upheld a city's right to change its zoning code pursuant to its police power even though the city had issued a building permit[1]. Morgan Hill has not issued a building permit in this instance. Accordingly, the instant facts are even more compelling in favor of the City than those in *Miller*. More recently, the California Supreme Court again confirmed a city's right to exercise its police power in the planning sphere by enacting an "inclusionary housing" ordinance. In *California Bldg. Industry Assn. v. City of San Jose*, 61 Cal.4th 435 (2015), the City of San Jose enacted an inclusionary housing ordinance that required all new residential development projects of 20 or more units to sell at least 15 percent of the for-sale units at a price that is affordable to low or moderate income households.

Very shortly after the ordinance was enacted and before it took effect, plaintiff California Building Industry Association filed a lawsuit in the Superior Court, maintaining that the ordinance was invalid on its face on the ground that the city, in enacting the ordinance, failed to provide a sufficient evidentiary basis "to demonstrate a reasonable relationship between any adverse public impacts or needs for additional subsidized housing units in the City ostensibly caused by or reasonably attributed to the development of new residential developments of 20 units or more and the new affordable housing exactions and conditions imposed on residential development by the Ordinance." *City of San Jose*, at 479-480.

The Court of Appeal held that the appropriate legal standard by which the validity of the ordinance is to be judged is the ordinary standard that past California decisions have uniformly applied in evaluating claims that an ordinance regulating the use of land exceeds a municipality's

[1] The city subsequently revoked the permit.

police power authority, namely, whether the ordinance bears a real and substantial relationship to a legitimate public interest. The Supreme Court agreed. "[W]e conclude that the judgment of the Court of Appeal in this case should be affirmed." *City of San Jose*, at 481.

The City's voters enacted the RDCS to regulate orderly residential development within the City. The intent of that initiative was that all residential development be included within RDCS. Leaving congregate care facilities outside the reach of the RDCS seems to be contrary to the spirit and intent of RDCS.

The City is permitted to change the zoning code after a project is approved if that change is necessary for health, safety, and welfare concerns. *See*, *Davidson v. County of San Diego*, 49 Cal.App.4th 639 (1996)(local authority amended the zoning code after project approval and prior to developer's application for a building permit; Court of Appeal held that vested rights may be impaired by subsequent police power enactments reasonably necessary to protect the public's health, safety and welfare.

The developer of a congregate care facility in Morgan Hill has raised the issue of whether a change in the City's zoning code would be deemed a taking, based upon the prior approvals granted to that developer. The developer is essentially claiming that it has a vested right in the current zoning classification. In fact, the City is permitted to change the zoning or other regulations after a project is approved as long as those changes are made prior to the issuance of a building permit and substantial expenditures based upon that building permit.

There are a series of cases that support the City's position in this matter. In *Davidson v. County of San Diego*, 49 Cal.App.4th 639 (1996) the County amended the zoning code after project approval and prior to developer's application for a building permit; Court of Appeal held that vested rights may be impaired by subsequent police power enactments reasonably necessary to protect the public's health and safety). In the case of *Consaul v. City of San Diego*, 6 Cal.App.4th 1781 (1992)(26 dwelling unit building allocation made by the City of San Diego to plaintiff's development project, under the terms of an interim development ordinance; city rezoned the subject property to single-family residential; plaintiff sued; the Supreme Court stated, "[N]either the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued").

Lastly in *Agins v. City of Tiburon*[2], 24 Cal.3d 266 (1979)(a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property; an ordinance which on its face results in a mere diminution in the value of the property is not *per se* improper.

In this instance, no building permit has been issued to the developer and additional work based upon the building permit has not been done. Arguably the developer may have a vested right in

the already constructed portion of its property. However, the City is not attempting to impose these changes upon the already constructed and occupied facilities.

If the City adopts this classification change, the developer has at least two alternatives available to it. First, the developer could comply with the regulations and develop a licensed residential care facility. A second alternative is that the developer could choose to not develop a licensed congregate care facility and instead could develop a senior apartment project and obtain RDCS allotments like nearly every other residential developer in the City.

CONCLUSION

The Planning Commission and the City have the right to change the classification of congregate care based upon interests in protecting the health, safety and welfare of the future residents and the public. The developer does not have a vested right in the existing classification of congregate care for the third portion of its project.