FIX THE CITY, INC. v. CITY OF LOS ANGELES
Case Number: 20STCP03529 [19STCP03740 (Lead), 20STCP01569 (Related)]
Hearing Date: February 25, 2022

ORDER GRANTING PETITION FOR WRIT OF MANDATE

Petitioner, Fix the City, Inc., challenges the approval of a housing development at 10757-10759 West Wilkins Avenue (the Project) by Respondent, the City of Los Angeles.

The City and Real Parties in Interest, 530 North Francisca, LLC and Banarsi Agarwal, jointly oppose the petition.

Petitioner's unopposed request for judicial notice (RJN) of Exhibits 1 through 11 is granted.

The City and Real Parties' unopposed RJN of Exhibits 1 through 7 is granted.

The objections to the Declaration of Beverly Grossman Palmer are sustained.

The petition is granted.

I. TRANSIT ORIENTED COMMUNITIES (TOC) GUIDELINES CHALLENGE

The parties stipulated (and this court has ordered) that the court's prior decision rejecting Petitioner's challenge to the TOC Affordable Housing Incentive Guidelines (TOC Guidelines) is applicable here. Petitioner's reference to the TOC Guidelines herein is intended to preserve the issue for appeal. (Opening Brief 5:19-24 [citing Pet.'s RJN Ex. 2.) That is, the court need not restate in this proceeding its rationale for upholding the City's TOC Guidelines.

II. PROJECT SPECIFIC CHALLENGES

STATEMENT OF THE CASE:

The Project:

The Project consists of a 5-story, 10-unit apartment building, including 2 units designated for very low-income households and 21 parking spaces. (AR 548.) The Project site is located at 10757-10759 West Wilkins Avenue, near St. Paul the Apostle Church and the Mormon Temple. (AR 556.)

The Project site is zoned RD1.5-1. (AR 556.) Under such zoning, a maximum density of 6 residential units is permitted by right. (AR 557.) In addition, the Project site is subject to the

Westwood Community Multi-Family Specific Plan (Specific Plan). (AR 556.) Among other purposes, the Specific Plan "establish[es] coordinated and comprehensible standards for parking, height, design, building massing, open space and landscaping for new projects in the area;" "enhance[s] the aesthetic qualities of multiple-family residential development so that it is more harmonious with adjacent single-family neighborhoods," and "adequately buffer single-family residential uses from adjacent multiple-family residential development to the greatest extent feasible." (Pet.'s RJN Ex. 1, p. 9.)

Currently, a three-unit apartment building sits on the Project site. At some time, the 3 rental units were subject to the City's Rent Stabilization Ordinance (RSO). (AR 11, 39-40, 244.)

Project Approval Process:

On August 21, 2019, the Westwood Community Design Review Board (DRB) conducted a hearing on the Project. (AR 92, 566.) Petitioner submitted written comments about the Project to the assigned city planner and requested its comments be distributed to the members of the DRB. (AR 97-100.)

The DRB conducted a second hearing on the Project on October 2, 2019. (AR 154-163.)

On November 6, 2019, the DRB recommended the Project be approved by the City subject to certain aesthetic conditions related to colors, materials, and landscaping, as well as the concealment of certain equipment. (AR 213.)

On January 13, 2020, the Department of City Planning issued a Director's Determination approving the Project and finding the Project complied with the TOC Affordable Housing Incentive Program (TOC Program) as well as the Specific Plan. (AR 238-260, 247, 250.) The Director's Determination approved an incentive of a 22-foot height increase over the maximum 33 feet base height allowed under the Specific Plan for a total building height of 55 feet. (AR 238.) The Director's Determination also approved a yard reduction incentive on the west side of the property from 8 feet to 5.6 feet and a 25 percent open space reduction. (AR 238-239.)

On January 28, 2020, several owners of property abutting the Project site timely appealed the Director's Determination to the City Planning Commission (CPC). The appeals challenged the Project's lack of compliance with the Specific Plan and the state's density bonus law among other things. (AR 320-345.)

The Department of City Planning's staff issued a report for the CPC for the appeals. (AR 357.) The report recommended the appeals be denied. (AR 374.)

The CPC heard the appeals on May 14, 2020. (AR 883.) The CPC denied the appeals adopting the staff report's recommendations. (AR 929, 548-572 [letter of determination proof of service dated May 19, 2020].)

This proceeding ensued.

STANDARD OF REVIEW

Los Angeles County Court Rules, Rule 3.231, subdivision (i)(3) requires the parties to set forth the court's scope of review in briefing. Petitioner did not do so, and its position on the standard of review is not particularly apparent.

Petitioner brings claims under both Code of Civil Procedure section 1085 and 1094.5.

The City suggests—and the court agrees—Petitioner's challenge based on the Specific Plan and TOC Program/TOC Guidelines is a matter of statutory interpretation subject to de novo or independent judgment review. Petitioner contends the City failed to proceed as required by law; it contends the City misapplied the law.[1]

As to Petitioner's claim based on Government Code section 65915, subdivision (c)(3) and its application to the Project through the TOC Program, the court's review is limited to whether the City's action was arbitrary, capricious or entirely lacking in evidentiary support.[2] (See *California Oak Foundation v. Regents of the University of California* (2010) 188 Cal.App.4th 227, 247.) It does not appear the matter is reviewed here for substantial evidence because the City held no hearing on the issue. (Code Civ. Proc. § 1094.5, subd. (a); see Opposition 11:7-9. ["City's determination regarding replacement rental units did not require an evidentiary hearing]."[3]

ANALYSIS

The Specific Plan and the TOC Program:

Petitioner argues the Project does not comply with the requirements of the Specific Plan. Petitioner contends the TOC Guidelines cannot override the requirements of the Specific Plan. Petitioner explains "[t]he Project received several incentives that allow development in excess of the limitations and requirements of the Specific Plan, even though the City law makes clear

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[1] Any claim the evidence does not support the findings or the findings do not support the decision would be subject to substantial evidence review. Petitioner does not challenge any factual findings by the City.

[2] " 'A writ cannot be used to control a matter of discretion. [Citation.] Where a statute leaves room for discretion, a challenger must show the official acted arbitrarily, beyond the bounds of reason or in derogation of the applicable legal standards.' [Citation.]" (*Ochoa v. Anaheim City School Dist.* (2017) 11 Cal.App.5th 209, 223 n. 3.)

[3] On the issue of replacement units, even if the City's determination is subject to substantial evidence review, the result herein would be no different. That the City's finding is entirely lacking in evidentiary support concerning replacement units would necessarily mean substantial evidence does not support the City's finding.

that the provisions of any specific plan prevail over conflicting requirements in City ordinances." (Opening Brief 2:13-15.)

As noted by the City, there is no dispute the City applied the TOC Program to the Project and provided incentives as permitted by the TOC Guidelines. The City reports, based on various factors and the TOC Guidelines, the Project was eligible for TOC Guidelines' base incentives of increased density and reduced parking as well as three Tier 3 additional incentives for increased height and reductions in yard and open space. (AR 246.)

There is also no dispute under the Specific Plan and the City's zoning code, the Project is limited to a height of 33 feet and required to provide 3,500 square feet of open space. (AR 558.) Despite such requirements, using the TOC Guidelines, the City approved the Project as a 55-foot high structure (a 22-foot increase) with only 2,627 square feet of open space (a 25 percent reduction). (AR 558.) Given the Project's deviation from the Specific Plan, Petitioner contends the Project could not have been approved by the City without an adjustment or amendment to the Specific Plan under the Los Angeles Municipal Code (LAMC) at section 11.5.7. (Pet.'s RJN Ex. 1 [Specific Plan], Ex. 4 [LAMC § 11.5.7], pp. 3-4.) Petitioner argues the LAMC does not allow the incentives available through the TOC Guidelines to supersede or override the requirements of the Specific Plan.

The Specific Plan provides:

> "Whenever this Specific Plan contains provisions which differ from provisions contained in Chapter I of the Los Angeles Municipal Code,[4] the Specific Plan shall prevail and supersede the application provisions of that Code."[5] (Pet.'s RJN Ex. 1, p. 10.)

The City contends the TOC Program applies to all housing developments regardless of the City's many various specific plans. That is, the TOC Program broadly applies to all housing developments without limitation and overrides any applicable specific plan provisions.

The TOC Program provides in part:

> "A Housing Development located within a TOC Affordable Housing Incentive Area shall be eligible for TOC Incentives if it provides minimum required percentages of On-Site Restricted Affordable Units, meets any applicable replacement requirements of California Government Code Section 65915(c)(3), and is not seeking and receiving a density or development bonus under the provisions of

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[4] The TOC Program is in Chapter I of the LAMC. It was approved by voters as Measure JJJ, the Build Better LA Initiative. (See Request for Judicial Notice filed March 18, 2021, Ex. 1, p. 17, Case No. 19STCP03740, *Fix the City, Inc. v. City of Los Angeles, et al.*)

[5] The City adopted the Specific Plan as its ordinance 163,203 on March 5, 1988. (Pet.'s RJN, Ex. 1, p. 1.)

California Government Code Section 65915 or any other State or local program that provides development bonuses. . . ." (LAMC § 12.22.31, subd. (b)(1) [emphasis added].)

The TOC Program also provides:

> "This [TOC] Program, and the provisions contained in the TOC [] Guidelines, shall apply to all Housing Developments that are located within a one-half mile radius of a Major Transit Stop, as defined in subdivision (b) of Section 21155 of the California Public Resources Code. Each one-half mile radius around a Major Transit Stop shall constitute a unique [TOC] Affordable Housing Incentive Area." (*Id.* at subd. (a) [emphasis added].)

The language of the TOC Program is broad and indicates it shall apply—seemingly without limitation—to projects in TOC Affordable Housing Incentive Area or "all Housing Developments that are located within a one-half mile radius of a Major Transit Stop." (*Ibid.*)

The TOC Guidelines are similar.[6] They suggest the City's specific plans were not intended as development ceilings. Rather, they are a starting point to which incentives are provided.[7]

The TOC Guidelines state:

> "These Guidelines provide the eligibility standards, incentives, and other necessary components of the TOC Program consistent with LAMC 12.22 A.31. In cases where Base or Additional Incentives are permitted, they shall be based off the otherwise allowable development standards for the property found in a zoning ordinance, Specific Plan, Community Plan Implementation Overlay (CPIO), overlay district, or other local condition, law, policy, resolution, or regulation (unless the TOC incentives have been amended per Section 111.3)." (TOC AR 325 [Emphasis added].)

Based on the foregoing, according to the City, the language in neither the TOC Program nor the TOC Guidelines limit TOC Program incentives based on the Specific Plan.

The City does not address LAMC section 12.22.31, subdivision (d) which recognizes "TOC Incentives . . . may be adjusted for an individual TOC Affordable Housing Incentive Area through a . . . Specific Plan . . . ." (TOC AR 20.) The TOC Program acknowledges adjustments for incentives may be required in particular incentive areas through Community Plan updates or specific plans. That adjustments to TOC incentives maybe required acknowledges the TOC

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[6] The TOC Guidelines provide the details for the TOC Program.

[7] Where there are limits to the TOC Guidelines based on the City's specific plans, the TOC Guidelines make that clear. (See, e.g., TOC AR 332. ["In the RD Zone or a Specific Plan or overlay district that regulates residential FAR, the maximum FAR increase shall be limited to 45%."])

Program does not override community and/or specific plans—they work together. The LAMC expressly recognizes TOC incentives are intended to work within community and specific plans. LAMC section 12.22.31, subdivision (d) undermines the City's position the TOC Program prevails over all specific plan provisions.

As Petitioner notes, however, the TOC Program and the TOC Guidelines allow deviations from development standards without any regard to the Specific Plan—that is, limitations specified in the Specific Plan may be exceeded through the TOC Guidelines. For example, while the Specific Plan would limit the Project's height to 33 feet, the TOC Guidelines permit the Project's height to be increased to 55 feet. Thus, there is a difference between the development standards permitted by the Specific Plan and those permitted under the TOC Program and its guidelines.

The City argues Petitioner "identifies no section of the L.A.M.C. or other legal authority to support its argument that the provisions of the Specific Plan supersede the exceptions authorized by Section 12.22." The Specific Plan, however, is clear; it prevails over other provisions in Chapter 1 of the LAMC.

> "Whenever this Specific Plan contains provisions which differ from provisions contained in Chapter I of the Los Angeles Municipal Code,[8] the Specific Plan shall prevail and supersede the application provisions of that Code." (Pet.'s RJN Ex. 1, p. 9 [emphasis added].)

Thus, under the plain language of the Specific Plan, the Specific Plan's development standards limitations should prevail over the TOC Program. Petitioner's position before the court is supported by the plain language of the Specific Plan. It is also supported by the language of LAMC section 12.22.31, subdivision (d) recognizing the TOC Program does not trump a specific plan's provisions—they work together.

The City's response is unpersuasive and sidesteps the issue. The City's interpretation is inconsistent with the language of the Specific Plan such that the City's interpretation is not entitled to deference. (*Berkeley Hills Watershed Coalition v. City of Berkeley* (2019) 31 Cal.App.5th 880, 896.)

To the extent the City relies on the TOC Guidelines' specific provisions concerning the City's specific plans to support its claim the TOC Program prevails over the Specific Plan, as argued by Petitioner, the TOC Guidelines do not have the weight of an ordinance; they cannot permit something beyond what is authorized by the municipal code. The City has not identified any provision of the TOC Program suggesting its provisions control over that of the Specific Plan here. In fact, LAMC section 12.22.31, subdivision (d) suggests otherwise.[9]

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[8] Again, the TOC Program is in Chapter I of the LAMC.

[9] In reply and at argument, the parties discussed whether Measure JJJ operated to impliedly repeal the Specific Plan's supremacy provision. "[A]ll presumptions are against repeal by implication." (*Flores v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 171, 176.) "To overcome

Based on the foregoing, Petitioner is entitled to relief.[10]

The Project's Compliance with the Replacement Housing Requirements:

Petitioner also argues the Project failed to replace affordable units as required by Government Code section 65915.

Government Code section 65915, subdivision (c)(3)(A) provides:

> "An applicant shall be ineligible for a density bonus or any other incentives or concessions under this section if the housing development is proposed on any property that includes a parcel or parcels on which rental dwelling units are or, if the dwelling units have been vacated or demolished in the five-year period preceding the application, have been subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of lower or very low income; subject to any other form of rent or price control through a public entity's valid exercise of its police power; or occupied by lower or very low income households, unless the proposed housing development replaces those units, and either of the following applies:
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> > (i) The proposed housing development, inclusive of the units replaced pursuant to this paragraph, contains affordable units at the percentages set forth in subdivision (b).

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the presumption the two acts must be irreconcilable, clearly regnant, and so inconsistent that the two cannot have concurrent operation. The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together." (*Penziner v. West American Finance Co.* (1937) 10 Cal.2d 160, 176.) Here, the two provisions may be interpreted to "stand together." The TOC Program's incentives may be awarded consistent with the Specific Plan but not in contravention of the Specific Plan's overriding authority provision. The TOC Program incentives "may be adjusted for an individual TOC Affordable Housing Incentive Area through a . . . Specific Plan." (LAMC § 12.22.31, subd. (d).) That is, the incentives are adjusted, not the Specific Plan. Of course, the Specific Plan is also subject to amendment pursuant to LAMC sections 11.5.7 and 12.32.

[10] In reply, Petitioner argues the Project "does not meet the requirements of the Westwood Community Multi-Family Specific Plan . . . ." (Reply 6:16-17.) While Petitioner notes it raised the issue with the CPC suggesting it administratively exhausted the issue, it appears Petitioner raised the issue for the first time in reply. The court could not locate the *specific* issue in Petitioner's Opening Brief. The City and Real Parties had no opportunity to respond to the argument. Therefore, the court finds Petitioner waived any claim based on the Specific Plan's step back requirements. (Reply 5:16-25.)

(ii) Each unit in the development, exclusive of a manager's unit or units, is affordable to, and occupied by, either a lower or very low income household." (Emphasis added.)

The TOC Program requires eligible housing development projects, like the Project, meet "any applicable replacement requirements of California Government Code section 65915(c)(3)" prior to the issuance of any building permit. (LAMC § 12.22.A.31, subd. (b)(1).)

Petitioner argues the Project site consists of three units subject to the City's RSO. (AR 39-40, 61.) Petitioner reports "[i]nstead of three very low-income units, the approved project is only providing two very low-income units, and these will not be regulated as replacement units under the RSO." (Opening Brief 9:20-22.)

The City disagrees with Petitioner's conclusion concerning RSO units and the Project site. The City's Housing and Community Investment Department (HCIDLA) reviewed the Project site's history. (AR 545.) HCIDLA determined "there were no residential units built or demolished on the [Project site] within the last five [] years." (AR 545.) HCIDLA's review of City records for the Project site revealed the rental units were removed from the rental market in 2003. (See Gov. Code § 7060 *et seq.*) (AR 545. City's RJN, Ex. 4 [2003 Notice of Intention to Withdraw].) The City made findings consistent with HCIDLA's report. (AR 275 [Director's Determination], 548 [CPC's Letter of Determination].)

The staff report prepared for the Director's Determination dated January 13, 2020 discusses HCIDLA's July 5, 2019 letter. (AR 266, 275.) The staff report labels HCIDLA's letter as "provisional and subject to verification by HCIDLA's Rent Division." (AR 275.) That HCIDLA's belief required verification is supported by language in HCIDLA's statement advising certain data (presumably about rents) for June 2014 through June 2019 would have to be collected. (AR 62.)

To prevail, Petitioner must demonstrate the City's decision was arbitrary, capricious or entirely lacking in evidentiary support.

HCIDLA's investigation and determination provides some evidentiary support for the City's decision, but HCIDLA's investigation is not (by its own terms) evidentiary support for whether the units were rented from June 2014 through June 2019; HCIDLA's opinion was provisional and conditioned on verification by its Rent Division. A definitive finding on the issue was required to determine whether replacement units were required of the Project under the Government Code and the TOC Program.

The City and Real Parties have not identified any record evidence suggesting HCIDLA's "provisional" finding was actually "verif[ied] by HCIDLA's Rent Division." (AR 275.) Therefore, the City's decision the Property did not provide rental units within the five years prior to the

application, and the City's conclusion the Project did not require replacement units, is unsupported by any evidence.[11]

Certainly, HCIDLA investigated and concluded no residential units were built or demolished at the Project site within the last five years. (AR 545.) It appears the foundation for HCIDLA's conclusion were records from the City's Department of Building and Safety.

HCIDLA also concluded the units were removed from the rental market in 2003. Again, HCIDLA appears to have relied upon records from the City's Department of Building and Safety to reach its conclusion.

There is no evidence, however, to support the City's implicit finding the Project site had no rental units on it within the five years prior to Real Parties' application for affordable unit determination.[12] HCIDLA's letter makes clear it would have to conduct further investigation; HCIDLA's letter indicates additional investigation was required:

> "Information about the existing property for the five (5) years prior to the date of the Application is required in order to make a determination. HCIDLA received the application on or about June 13, 2019, so HCIDLA must collect data from June 2014 to June 2019." (AR 62.)

Neither the City nor the Real Parties suggest any record evidence supports further investigation and determination by HCIDLA through its Rent Division. (AR 275.) Thus, there appears to be no evidentiary support for the City's decision the Project did not require replacement units.

Beyond the lack of evidentiary support, Petitioner argues evidence in the record suggests the units had, in fact, been returned to the rental market and rented to tenants within five years of the Project application. Petitioner notes, on the environmental assessment form submitted by Real Parties to the City (and sworn to be true), Real Parties indicated the Project site contained a vacant structure. (AR 29, 31). Real Parties explained as of April 19, 2019, the structure had been vacant for four to six months. (AR 37.) The term "vacant," however, is ambiguous. Vacant can meant "not put to use," and it can mean "not lived in." (www.meriam-webster.com/dictionary/vacant) Without more, that Real Party indicated the property had been "vacant" for approximately four to six months does not necessarily mean the rental units had been returned to the rental market.[13]

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[11] During the administrative proceedings, the City repeatedly referred to HCIDLA's determination on replacement units as "provisional and subject to verification by HCIDLA's rent division." (AR 927 [ll. 17-21] [discussion at CPC hearing on May 14, 2020]. See also AR 275.)

[12] Petitioner notes HCIDLA's letter omitted any discussion of whether the units at the Project site were *rented* within the last five years. If such rental had occurred, the units would be rental units subject to the RSO. (Pet.'s RJN Ex. 7, p. 31.)

[13] When asked specifically about residential housing units, Real Party indicated none of the units had been vacated in the last five years. (AR 153.)

The environmental assessment form also indicated the Project would remove three residential units. (AR 31.) The representation does not suggest the units were returned to the rental market and rented after 2003. Instead, it reports the structure with three existing residential units would be destroyed for the Project. (AR 31.)

Finally, Real Parties admitted the Project site consisted of RSO units. (AR 153.) That the Project site contained RSO units does not establish the units were rented within the last five years. The RSO units remained RSO units even though they had been withdrawn from the market in 2003. (Pet.'s RJN Ex. 7, p. 31.)

Petitioner does provide HCIDLA's registration records showing rental units registered under the RSO in 2018-2019. (Pet.'s Reply RJN, Ex. 11.) While the declaration of registration notes it does not reflect whether the property is subject to the RSO, the document indicates RSO fees were paid for 2018-2019.[14] (Pet.'s Reply RJN, Ex. 11.) Given the failure to pay such fees in the years prior, it is reasonable to infer the rental units were returned to the market at some point in 2018. This is especially true given that the RSO requires a landlord to obtain a registration statement before accepting rent for a unit. (Pet.'s RJN Ex. 7, p. 7.) There would have been no point for Real Parties to register the units unless they intended to collect rents.

Real Parties' own statements and the other evidence cited by Petitioner undermines HCIDLA's findings that the rental units did not exist and therefore need not be replaced pursuant to Government Code section 65915, subdivision (c)(3)(A) if destroyed. All of the available evidence before the City suggests its finding there were no residential units on the Project site subject to the RSO rented within the last five years is lacking in evidentiary support.[15] Nothing suggests HCIDLA's provisional finding that the Project did not require replacement units was verified by HCIDLA's Rent Division. Such verification, as noted by the staff report for the Director's Determination, appears not to have been made by January 13, 2020, and nothing suggests the City obtained the information required to verify HCIDLA's "provisional" conclusion prior to approving the Project.

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[14] The period of registration falls within the period for which HCIDLA would collect data for information about the property to determine whether the units had been used as rental dwelling units.

[15] Real Parties attempt to flip the burden upon Petitioner to demonstrate there is evidence in the record the units were rented for payment. In actuality, it was up to the City to determine no units subject to the RSO had been rented from June 2014 through June 2019. There is no evidence to suggest the City did so. As of January 13, 2020, HCIDLA's finding on the issue was still provisional and subject to verification from its Rent Division. Nothing suggests the Rent Division ever verified HCIDLA's provisional finding.

CONCLUSION

Based on the foregoing, the petition is granted.

IT IS SO ORDERED.

May 24, 2022

Hon. Mitchell Beckloff
Judge of the Superior Court

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