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June 11, 2014

Members of the Housing Element Subcommittee
City of Sausalito
420 Litho Street
Sausalito, California 94965

Dear Subcommittee Members:

I realize you are nearing the end of a long road towards finalization of this period's housing element. So you will not be happy with me when I suggest, and suggest strongly, that you take a detour in achieving your goal. I do not make this suggestion lightly and I have four very good reasons for doing so:

1. You asked those opposed to the current housing element proposal to suggest an alternative. It has been brought to my attention that such an alternative exists and I will summarize it in this letter. This alternative was not authored by me but I have reviewed it as have legal minds familiar with the requirements of the housing element and we have determined it satisfies the requirements and conditions of housing element law;
2. The zoning overlays under consideration increase the density allowable and thus call into question the need for an environmental impact analysis of the overlays; the alternative proposal appears to be within the circumstances upon which the negative declaration was originally declared;
3. Experienced hands warn of the risk of cities overpromising when submitting Housing Elements. If you have not done so, I encourage you to read "Housing Elements: Beware of What You Promise" by Barbara Kautz of the law firm Goldfarb and Lippman LLP, as published by the League of California Cities last September[1]. Ms. Kautz wrote the piece to assist City Attorneys in protecting their cities from potential litigation arising from the housing element process. The higher density overlays currently being proposed smack of such overpromising, particularly in light of the alternative plan I am about to describe; and
4. Much has been made of the risks of not complying with the Housing Element requirements. These dire warnings appear overstated. Ms. Kautz notes that in a database maintained by the League of California Cities of 46 housing element lawsuits involving 38 jurisdictions, most plaintiffs challenged housing elements that had not been updated for many years and were clearly inadequate, and the case is settled in trial court[2]. When the Court of Appeal has actually analyzed the content of the housing element (as opposed to ruling on remedies for a clearly inadequate housing element), in only three instances has the court found a housing element to be

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[1] http://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2013/2013-Annual-Conference-City-Attorneys-Track/9-2013-Annual-Barbara-Kautz-Housing-Elements_Bewar.aspx

[2] See Hoffmaster v. City of San Diego (1997) 55 Cal.App.4th 1098; Buena Vista Gardens Apartments Ass'n v. City of San Diego (1985) 175 Cal.App.3d 289; Camp v. County of Mendocino (1981) 123 Cal.App.3d 334. Him

inadequate. In the last three cases to reach the Court of Appeal, all of the housing elements were found to substantially comply with State law[3].

The Alternative

- To meet the Regional Housing Needs Assessment
  a. 81 units minus 22 units already built = 59 Units needed
  b. Satisfy requirement with Accessory Dwelling Units (ADU's);
  c. It is recognized that Housing and Community Development (HCD) representatives have already rejected an ADU approach as the program does not have an "adequate track record" but this rejection is flawed based on information from HCD's own website:
  "Absent a track record or development trends to demonstrate the feasibility of a recycling or redevelopment strategy, the housing element should describe existing or planned financial assistance or <u>*regulatory relief from development standards*</u> *[emphasis added]that will be provided to encourage and facilitate more intensive residential development on the identified underutilized sites."*
  The City of Sausalito has provided "regulatory relief" within the past two years by legalizing ADU's, by providing amnesty for such existing units and by enacting the Multi Family Ordinance this past December to encourage and facilitate more intensive residential development on identified underutilized sites. A revamped, less restrictive approach to the ADU process could well produce many more such units.
- To meet the "Variety of Types of Housing" requirement
  a. The HCD representatives are mandating higher density developments as the only means of providing a "variety of housing types"; economic reality is that such developments would only provide at best "affordable housing" with concomitant high Marin rental rates; in the real world, low income housing is the result of renovation or adaptive reuse of existing stock, which is not apparently on the HCD radar screen.
  b. Multi-Family Housing: Satisfy by underutilized R-3 zones and adaptive reuse of existing stock, such as the Lily Pad Homes[4] approach; the response that the R-3 units have already been counted is based on a screen using parking and slope as elimination criteria; we residents have been ignoring slope obstacles for decades and a reduced parking is an incentive in the housing legislation; the Lily Pad Homes program would be a win-win for residents and renters…and a win for the Housing Element Subcommittee.
  c. Family Housing: Satisfy by underutilized R.2, R.2-5, and R-3 Zones and adaptive reuse of existing stock, as noted above.

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[3] See Latinos Unidos del Valle de Napa y Solano v. County of Napa (2013) 217 Cal.App.4th 1160 (note that the housing element portion of the case is unpublished); St. Vincent's School for Boys v. City of San Rafael (2008) 161 Cal.App.4th 989; Fonseca v. City of Gilroy (2007) 148 Cal.App.4th 1174. The California Department of Housing and Community Development had determined that the Gilroy and Napa County housing elements did not substantially comply with State law.

[4] http://www.houzz.com/pro/rfginis/lilypad-homes

The HCD insistence on high density development is not mandated by the law *per se*. We can address the various requirements for number and variety in a diversified, and quite frankly, a much better manner. Remember HCD's adopted guidelines are only "advisory"[5] and the courts have given little deference to its conclusions[6].

The currently proposed "mixed use" zoning overlays will allow higher density development than is needed to satisfy the housing element law. The VMU and HMU overlays are specifically designed to reduce and/or remove resident serving businesses. This higher density and change in neighborhood character are not necessary and are inconsistent with the fabric of the City.

I encourage you to reconsider your approach and avoid "overpromising".

Sincerely,

John Flavin
Sausalito Resident

[5] California Code Section 65585(a).
[6] The Fonseca court stated that it would respect HCD's interpretation of the Housing Element Law only "in accordance with [the court's] view of the substantive merits of the Department's statutory interpretation." (Fonseca, 148 Cal.App.4th at 1194.)