



March 3, 2018

Mayor Bonilla and City of San Mateo Councilmembers
City of San Mateo
330 W. 20th Avenue
San Mateo, CA 94403
TRANSMITTED VIA EMAIL

RE: March 5, 2018 City Council Meeting Agenda Item #9, Urgency Ordinance Imposing Moratorium

Dear Mayor Bonilla and Councilmembers,

BIA Bay Area is a non-profit association comprising hundreds of members involved in developing and building housing. BIA's members are builders, developers, subcontractors, design professionals, and related entities. BIA's members build and develop sustainable communities that produce critically needed housing of all types throughout the Bay Area. BIA advocates in favor of housing opportunities for all Bay Area residents, and opposes efforts to restrict or disadvantage particular types of housing and the opportunities they provide for the needs, hopes and aspirations of the Bay Area's very diverse set of individuals, households, and families (both "traditional" and "nontraditional"). BIA also educates the public and elected officials about the Bay Area's unprecedented housing supply crisis caused principally by the Bay Area local governments' voracious appetite for new jobs combined with an equally puissant aversion to approve the housing needed to accommodate them (see www.housing4allbayarea.com/)

With the Bay Area in the midst of the worst housing supply crisis in history, the City recklessly is proposing a moratorium on the development of rental housing, i.e. multifamily housing. No jurisdiction should shirk its duty to provide housing of all income types by imposing egregious and illegal obstacles for the development of multifamily housing. The State of California has made clear that jurisdictions engaging in this behavior will face increasingly strict scrutiny for their actions. The legislature has provided the Department of Housing and Community Development (HCD) with more investigative and enforcement power and has made it clear that this increased authority shall be exercised.

The Building Industry Association of the Bay Area respectfully submits the following objections to proposed Urgency Ordinance Imposing a Moratorium on Rental Housing:

1. Violation of Gov't Code § 65858, subd. (c) Heightened Findings Requirement.

This statute explicitly applies to charter cities:

- (a) Without following the procedures otherwise required prior to the adoption of a zoning ordinance, the legislative body of a county, city, *including a charter city*...

Additionally, the courts have held 65858 preemptive the field of moratoria:

Bank of the Orient v. Town of Tiburon
(1990) 220 Cal.App.3d 992

Under Gov. Code § 65858 an interim ordinance may not be adopted or extended “unless the ordinance contains legislative findings that there is a current and immediate threat to the public health, safety, or welfare, and that the approval of additional subdivisions, use permits, variances, building permits, or any other applicable entitlement for use which is required in order to comply with a zoning ordinance would result in that threat to public health, safety, or welfare.” (Gov.Code, § 65858, subd. (c).) Additional requirements apply if the legislative body seeks to extend an interim ordinance “that has the effect of denying approvals needed for the development of projects with a significant component of multifamily housing.” The legislative body may extend such an interim ordinance only “upon written findings adopted by the legislative body, supported by substantial evidence on the record, that all of the following conditions exist:

“(1) The continued approval of the development of multifamily housing projects would have a specific, adverse impact upon the public health or safety. 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 that the ordinance is adopted by the legislative body. “(2) The interim ordinance is necessary to mitigate or avoid the specific, adverse impact identified pursuant to paragraph (1). “(3) There is no feasible alternative to satisfactorily mitigate or avoid the specific, adverse impact identified pursuant to paragraph (1) as well or better, with a less burdensome or restrictive effect, than the adoption of the proposed interim ordinance.” (Gov.Code, § 65858, subd. (c), italics added.)....

Thus, a city or county may adopt an interim ordinance to prevent development that would be inconsistent with a contemplated land use plan or zoning proposal if the legislative body, by a four-fifths vote, finds that such development would pose an immediate threat to the public health, safety, or welfare. (Gov.Code, § 65858, subs. (a)-(c).) Such an interim ordinance is valid for a period of 45 days, but can be extended so that the full duration of the measure is up to two years. (Id., subs. (a), (b).) The legislative body, however, cannot extend an interim ordinance “that has the effect of denying approvals needed for the development of projects with a significant component of multifamily housing” (id., subd. (c)) unless the legislative body makes the findings set forth in paragraphs (1) through (3) of Government Code section 65858, subdivision (c). (Id., subd. (c).) *Hoffman Street, LLC v. City of West Hollywood* (2009) 179 Cal.App.4th 754, 764–65. (emphases added)

The purpose of the requirement under Government Code section 65858, subdivision (c) that the legislative body make additional findings, supported by substantial evidence in the record, upon the extension of an interim ordinance that has the effect of denying approvals needed for the development of projects with a significant component of multifamily housing is to avoid undue restrictions on the development of multifamily housing. The legislative body adopting such an extension must find that an extension is necessary to mitigate or avoid a specific, adverse impact on public health or safety identified by the legislative body, and that there is no feasible alternative to satisfactorily mitigate or avoid that impact, as stated in paragraphs (1) through (3) of subdivision (c). *Hoffman Street, LLC v. City of West Hollywood* (2009) 179 Cal.App.4th 754, 766.

The Legislature amended §65858 in 2001 (SB 1098) to add these provisions in direct response to local governments' abuse of the state-delegated authority to utilize this extraordinary mechanism with respect to multifamily housing. The Senate Rules Committee's analysis of the bill provides:

Purpose of the bill. According to the author, removing barriers to housing development at the local government level is one of the keys to increasing housing production in California. Moratoria are often used to block rental housing projects that a local government otherwise has no legal authority to deny under laws like the Anti-NIMBY [Housing Accountability] act. The delay caused by a moratorium can kill a project by making it financially infeasible....

The author believes that this bill will ensure that multifamily housing moratoria are legitimate by requiring that findings be based on objective evidence that the proposed development would result in adverse health and safety impacts. (http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_1051-1100/sb_1098_cfa_20010831_175721_sen_floor.html)

The proposed Ordinance does not purport to make the very stringent findings legally required to extend the moratorium. In addition, there is no evidence—substantial or otherwise—that could support such findings. Neither the recitals in the proposed Ordinance, the information discussed in the staff report (including the amending the City's charter to comply with preemptive state law), or any other information in the record, establishes the existence of a significant health or safety threat, based on identified, objective, written, health and safety standards, and that the moratorium is necessary to alleviate that threat.

The proposed ordinance would impose a 90 day moratorium on the approval of new rental residential development - including multifamily housing – pending the voters' consideration of an amendment to Measure P. However, State law expressly limits an interim moratorium to 45 days. Neither the interim ordinance nor the staff report or any other information in the record establishes any particulars regarding the City of San Mateo voters' consideration of an amendment to Measure P within the unlawful 90 day period of the ordinance, let alone the State mandated maximum 45 day period.

Pursuant to subdivision (c) of Gov't Code §65858, no moratorium ordinance that has the effect of denying approval needed for multifamily development can be extended unless the city council makes specific findings including that the extension is necessary to avoid a specific health or safety impact. These requirements represent an extremely high bar to extend a moratorium impacting multifamily development and cannot be satisfied by the type of health, safety, and welfare findings that justify an initial moratorium or the extension of a moratorium that does not impact multifamily housing.

2. Inconsistency With Certified Housing Element.

Based on the language of state housing element law, and its implementation by the California Department of Housing and Community Development, BIA believes that the proposed Ordinance is inconsistent with the City's adopted Housing Element and therefore would either be void ab initio or cause the Housing Element to out of compliance with state law and/or decertified by HCD.

The City should be aware that under very similar circumstances, HCD notified the City of Emeryville that a proposed moratorium ordinance was inconsistent with its recently certified Housing Element and that HCD would expect the City to amend its Housing Element and resubmit it to HCD for a new certification

review if the moratorium were adopted. The City did not extend the moratorium beyond the initial 45day period.

Additionally, HCD has commented on moratorium law in the City of Los Altos:

Further, taking actions to prohibit, even temporarily, multifamily development is viewed as a serious constraint and contrary to planning and zoning law, particularly housing element and related laws. Taking or extending such action could warrant immediate action, including amending and submitting the housing element to identify and address this constraint on development and how current and projected housing needs will be met. (Paul McDougal, Housing Policy Manager, July 2017)

BIA strongly counsels the City of San Mateo City Council not to adopt an interim ordinance /moratorium on new rental housing. Moratoria in general raise profound public policy implications because of their drastic consequences, not only to the city, but to the surrounding region as well. Moratoria prohibiting the approval of vitally needed multifamily housing in the Bay Area warrant even greater care and circumspection. That is why the Legislature has preempted the field with respect to moratoria, imposing stringent procedural and substantive restrictions on local governments' (including charter cities') ability to adopt them. Moratoria impacting multifamily housing are subject to an even more exacting set of limitations. The City's legislative findings that there is a "current and immediate threat to the public health, safety, or welfare" fall well short of standards required by State law and by court decisions.

The City Council must move away from this action and find the will and means to mandate compliance with the provisions of AB 1505 on prospective development projects without imposing a moratorium on critical housing supply.

Yours very truly,

Dennis Martin
BIA|BAY AREA

cc: City Clerk
City Attorney
City Manager