Communication from Public

Name: Keith Diggs (YIMBY Law)
Date Submitted: 10/02/2023 01:06 PM
Council File No: 23-0908
Comments for Public Posting: Following up on our letter of September 19 regarding a similarly situated project at 5501–11 N. Ethel Ave. (case no. CF 23-0835), YIMBY Law remains concerned that the City of Los Angeles might refuse to honor an SB 330 preliminary application (see Gov. Code § 65589.5, subds. (o)(1), (4)) that was submitted in reliance on an executive directive then in effect. (Compare Mayor of L.A.'s Exec. Dir. No. 1 (Dec. 22, 2022) ["ED 1"] with Mayor of L.A.'s Exec. Dir. No. 1 (revised June 12 and July 7, 2023) ["Revised ED 1"].) The project at 8217 N. Winnetka Ave. will be the second of these projects to be heard by your committee, and we ask you to honor state vesting law and approve these much-needed affordable housing projects. We reserve our right to pursue litigation under the Housing Accountability Act (Gov. Code § 65589.5) if necessary. The issue is not whether the preliminary applications could vest under Revised ED 1, because the preliminary applications were submitted before ED 1 was revised. Instead, the question is whether subdivision (o) of the Housing Accountability Act ("HAA"), as amended by SB 330 to vest the development rights of affordable housing development projects upon submission of a preliminary application, includes ED 1 among the "ordinances, policies, and standards" within its scope. (Gov. Code § 65589.5, subds. (o)(1), (4).) We submit that it does. The vesting law's purpose is clear, and its scope is broad. State law recognizes a "preliminary application" that affordable developers may submit on a form that the City has adopted. (Gov. Code § 65941.1, subds. (a), (b)(1)–(2).) The HAA in turn provides that "a housing development project shall be subject only to the ordinances, policies, and standards adopted and in effect when a preliminary application . . . [i]s submitted." (Id. § 65589.5, subd. (o)(1), italics added.) The statutory definition of "ordinances, policies, and standards" is expansive, and makes no exceptions. If it somehow excludes mayoral executive directives (and it doesn't), the exclusion isn't expressed in the text. It's hard to imagine how an executive directive wouldn't come within the scope of subdivision (o). Courts recognize executive directives when interpreting law, and have called an executive directive a "requirement." This is the same word that appears in subdivision (o). (Gov. Code § 65589.5, subd. (o)(4); see City of Long Beach v. City of Los Angeles (2018) 19 Cal.App.5th 465, 492

[upholding a final EIR that reject“no project alternative” as frustrating “Executive Directive No. 10”]; 1049 Market Street, LLC v. City & Cnty. of San Francisco (Super. Ct. S.F. City and County, July 11, 2017, No. CPF-16-515046) 2017 Cal. Super. LEXIS 502, *7 [taking judicial notice of a mayoral executive directive commanding discretionary review of proposals that would result in a loss of housing].) Vesting rights have been broadly construed in the analogous context of the Subdivision Map Act (Gov. Code §§ 66410 et seq.), even if the appellate courts have not construed subdivision (o) of the HAA since it was added by the Housing Crisis Act of 2019. (Cf. Save Livermore Downtown v. City of Livermore (2022) 87 Cal.App.5th 1116, 1124–30 [construing other HAA provisions in support of housing]; Cal. Renters Legal Advocacy & Educ. Fund v. City of San Mateo (2021) 68 Cal.App.5th 820, 835–46 [same].) Just like vesting rights under subdivision (o), the Subdivision Map Act mandates that a local agency must honor all “ordinances, policies, and standards in effect” at the time an application is submitted. (Id. § 66474.2, subd. (a); accord id. § 66489.1, subd. (b).) These vesting rights have been found to preempt later-enacted voter initiatives (Redondo Beach Waterfront, LLC v. City of Redondo Beach (2020) 51 Cal.App.5th 982, 994–95) and capital-facility fee escalations (Kaufman & Broad Cent. Valley, Inc. v. City of Modesto (1994) 25 Cal.App.4th 1577, 1591). If there’s a case that would exempt executive directives from “ordinances, policies, and standards” (Gov. Code § 65589.5, subds. (o)(1), (4); id. § 66474.2, subd. (a); id. § 66489.1, subd. (b)), we cannot find it. In short, the correct interpretation of subdivision (o) is the intuitive one: a preliminary application vests according to the terms of an executive directive then in effect, and a subsequent revision of the executive directive then in effect, and a subsequent revision of the executive directive does not constrain those projects preliminarily applied for. The California Department of Housing & Community Development agrees with us. We regret that the City needs to be reminded of this, and (again) we reserve our right to pursue litigation against the City if the City fails to approve the project. Thank you for your attention to this matter, and please contact me if further discussion would avail. Sincerely, Keith Diggs (keith@yimbylaw.org) Attorney, YIMBY Law

YIMBY LAW

877 Cedar Street #150 | Santa Cruz, CA 95060

October 2, 2023

via email
L.A. City Council Planning & Land Use Mgmt. Committee, clerk.plumcommittee@lacity.org

Re: "Vesting" of Development Rights Under the Mayor's Executive Directive (8217 N. Winnetka Ave., Case No. CF 23-0908)

To the Planning & Land Use Management Committee:

Following up on our letter of September 19 regarding a similarly situated project at 5501–11 N. Ethel Ave. (case no. CF 23-0835), YIMBY Law remains concerned that **the City of Los Angeles might refuse to honor an SB 330 preliminary application** (see Gov. Code § 65589.5, subds. (*o*)(1), (4)) that was submitted in reliance on an executive directive then in effect. (Compare Mayor of L.A.'s Exec. Dir. No. 1 (Dec. 22, 2022) ["ED 1"] with Mayor of L.A.'s Exec. Dir. No. 1 (revised June 12 and July 7, 2023) ["Revised ED 1"].) The project at 8217 N. Winnetka Ave. will be the second of these projects to be heard by your committee, and we ask you to honor state vesting law and approve these much-needed affordable housing projects. **We reserve our right to pursue litigation under the Housing Accountability Act (Gov. Code § 65589.5) if necessary.**

The facts as we understand them are simple. When the preliminary applications were submitted, ED 1 commanded city departments to approve all 100% affordable housing projects at "the densit[ies] permitted . . . by the applicable zoning or the General Plan Land Use Designation" as augmented by "the State Density Bonus and LAMC bonuses, incentives, waivers and concessions." (ED 1, ¶ 2.) Due to an often-litigated unconformity between the City's single-family zoning and low-density residential general-plan designations (*e.g.*, *Snowball W. Invs. L.P. v. City of Los Angeles* (B314750, app. pending)), in conjunction with the Density Bonus Law (Gov. Code §§ 65915 *et seq.*), the original ED 1 authorized ministerial approval of 100% affordable multi-family projects on single-family sites. *After* the preliminary applications were submitted, the mayor revised ED 1 to except that "in no instance shall the project be located in a single family or more restrictive zone." (Revised ED 1, ¶ 1.)

The issue is not whether the preliminary applications could vest under Revised ED 1, because the preliminary applications were submitted before ED 1 was revised. Instead, the question is whether subdivision (*o*) of the Housing Accountability Act ("HAA"), as amended by SB 330 to vest the development rights of affordable housing development projects upon submission of a preliminary

application, includes ED 1 among the "ordinances, policies, and standards" within its scope. (Gov. Code § 65589.5, subds. (*o*)(1), (4).) We submit that it does.

The vesting law's purpose is clear, and its scope is broad. State law recognizes a "preliminary application" that affordable developers may submit on a form that the City has adopted. (Gov. Code § 65941.1, subds. (a), (b)(1)–(2).) The HAA in turn provides that "a housing development project shall be subject *only to the ordinances, policies, and standards adopted and in effect* when a preliminary application . . . [i]s submitted." (*Id.* § 65589.5, subd. (*o*)(1), italics added.) For purposes of this rule,

> 'ordinances, policies, and standards' includes general plan, community plan, specific plan, zoning, design review standards and criteria, subdivision standards and criteria, and *any other rules, regulations, requirements, and policies of a local agency*, as defined in Section 66000,[1] including those relating to development impact fees, capacity or connection fees or charges, permit or processing fees, and other exactions.

(*Id.*, subd. (*o*)(4), italics and footnote added.) This definition of "ordinances, policies, and standards" is expansive, and makes no exceptions. If it somehow excludes mayoral executive directives (and it doesn't), the exclusion isn't expressed in the text.

It's hard to imagine how an executive directive *wouldn't* come within the scope of subdivision (*o*). Courts recognize executive directives when interpreting law, and have called an executive directive a "requirement." This is the same word that appears in subdivision (*o*). In *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, the Supreme Court of California upheld the mayor's Executive Directive No. 1-C, establishing a program under which city contract bids had to document outreach to minority- and women-owned subcontractors (*id.* at pp. 165–68), against a claim that the program violated a charter requirement awarding contracts "to the lowest and best regular responsible bidder." (*Id.* at pp. 165, 169–70.) The *Domar* court saw "no conflict between the [executive directive's] outreach program and the purposes of [the charter requirement for] competitive bidding." (*Id.* at p. 173.) *Domar* repeatedly framed Executive Directive No. 1-C as a "requirement." (*Id.* at pp. 170, 172–73, 175–76, 178.) Neither *Domar* nor the HAA construe "requirement" as other than its usual meaning. Even if they had, we cannot fathom how courts would pay executive directives any attention (as they do) if executive directives don't count among "policies," "standards," "rules," or "regulations." (Gov. Code § 65589.5, subd. (o)(4); see *City of Long Beach v. City of Los Angeles* (2018) 19 Cal.App.5th 465, 492 [upholding a final EIR that rejected a "no project alternative" as frustrating "Executive Directive No. 10"]; *1049 Market Street, LLC v. City & Cnty. of San Francisco* (Super. Ct. S.F. City and County, July 11, 2017, No.

[1] " 'Local agency' means a county, city, whether general law or chartered, city and county, school district, special district, authority, agency, any other municipal public corporation or district, or other political subdivision of the state." (Gov. Code § 66000, subd. (c).) Nothing in this statutory definition excludes the mayor of a local agency.

CPF-16-515046) 2017 Cal. Super. LEXIS 502, *7 [taking judicial notice of a mayoral executive directive commanding discretionary review of proposals that would result in a loss of housing].) Vesting rights have been broadly construed in the analogous context of the Subdivision Map Act (Gov. Code §§ 66410 *et seq.*), even if the appellate courts have not construed subdivision (*o*) of the HAA since it was added by the Housing Crisis Act of 2019. (Cf. *Save Livermore Downtown v. City of Livermore* (2022) 87 Cal.App.5th 1116, 1124–30 [construing other HAA provisions in support of housing]; *Cal. Renters Legal Advocacy & Educ. Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 835–46 [same].) Just like vesting rights under subdivision (*o*), the Subdivision Map Act mandates that a local agency must honor all "ordinances, policies, and standards in effect" at the time an application is submitted. (*Id.* § 66474.2, subd. (a); accord *id.* § 66489.1, subd. (b) ["When a local agency approves . . . a vesting tentative map, that approval shall confer a vested right to proceed with development in substantial compliance with the ordinances, policies, and standards described in Section 66474.2."].) This is a vesting tentative map's "most notable feature" (*Bright Dev. v. City of Tracy*, 20 Cal.App.4th 783, 788), and it "allows a builder to rely on the regulations, conditions, and fees that exist at the planning stage when assessing the economics of . . . a development that may take years or even decades to complete." (*N. Murrieta Cmty., LLLC v. City of Murrieta* (2020) 50 Cal.App.5th 31, 41.) These vesting rights have been found to preempt later-enacted voter initiatives (*Redondo Beach Waterfront, LLC v. City of Redondo Beach* (2020) 51 Cal.App.5th 982, 994–95) and capital-facility fee escalations (*Kaufman & Broad Cent. Valley, Inc. v. City of Modesto* (1994) 25 Cal.App.4th 1577, 1591). If there's a case that would exempt executive directives from "ordinances, policies, and standards" (Gov. Code § 65589.5, subds. (*o*)(1), (4); *id.* § 66474.2, subd. (a); *id.* § 66489.1, subd. (b)), we cannot find it.

In short, the correct interpretation of subdivision (*o*) is the intuitive one: a preliminary application vests according to the terms of an executive directive then in effect, and a subsequent revision of the executive directive does not constrain those projects preliminarily applied for. The California Department of Housing & Community Development agrees with us. We regret that the City needs to be reminded of this, and (again) **we reserve our right to pursue litigation against the City if the City fails to approve the project.** Thank you for your attention to this matter, and please contact me if further discussion would avail.

Sincerely,

Keith Diggs (keith@yimbylaw.org)
Attorney, YIMBY Law