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July 8, 2024

Planning Commission
Carmel-by-the-Sea, California

Re: DR 23-140 & LM 20-394 & UP 21-113 (Esperanza Carmel Commercial – JB Pastor Building hearing July 10, 2024

Dear Chair LePage and Planning Commissioners:

I respectfully present the following thoughts for your consideration while reviewing the design of the JB Pastor Building. Please include this document in the record of this hearing.

The staff report for the hearing states the project is exempt under CEQA. The report cites the In-Fill exemption. That is incorrect, and before the commission proceeds with its design review, it should consider this issue and understand the CEQA process, its requirements and benefits.

In the discussion below, it is important to keep in mind that the CEQA process is meant to inform the approval process. State law declares one purpose of the CEQA process to be:

to assist public agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects.” (PRC 21002)

The city should have begun the CEQA process immediately after it city received the application. According to CEQA law, after receiving an application, the city has 30 days to determine if the application is complete. Then, it has another 30 days to determine if the project is exempt from CEQA. If the project is not exempt, the city must complete an initial study to identify the environmental consequences of the project. (14 CCR 15060 to 15065)

CEQA does provide for preliminary discussion between the applicant and the staff before the application is submitted (14 CCR 15060.5), but CEQA does not allow numerous “preliminary hearings” before the Historic Resource Board, Planning Commission and the City Council before the city decides that design review is a covered project and if it qualifies for an exemption; that must be done within 60 day after receiving the application. For your reference, state CEQA guidelines define a covered project as follows:

(a) "Project" means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following:

[...]

(3) An activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies. (14 CCR 15378)

It is readily apparent that this design review is a project under CEQA. So, the CEQA process required, and still requires, that the commission review the development's plans to determine if it qualifies for an exemption.

CEQA rules prohibits the city from using a categorical exemption, such as the In-Fill exemption, for any project that may negatively impact the significance of an historic resources:

(a) The guidelines prepared and adopted pursuant to Section 21083 shall include a list of classes of projects that have been determined not to have a significant effect on the environment and that shall be exempt from this division. In adopting the guidelines, the Secretary of the Natural Resources Agency shall make a finding that the listed classes of projects referred to in this section do not have a significant effect on the environment.

[...]

(e) A project that may cause a substantial adverse change in the significance of a historical resource, as specified in Section 21084.1, shall not be exempted from this division pursuant to subdivision (a). (PRC 21084)

The City Council determined that the development would adversely impact the historical significance of the community room, its wall, and the entire bank building complex. So, you may and probably should, assume that the council is correct and then you must conclude that the project is not exempt from the CEQA process under any categorical exemption. Furthermore, the project does not qualify for an In-Fill exemption.

CEQA regulation 15332 states the criteria that a development must satisfy to qualify for an in-fill exemption.

15332. IN-FILL DEVELOPMENT PROJECTS

Class 32 consists of projects characterized as in-fill development meeting the conditions described in this section.

(a) The project is consistent with the applicable general plan designation and all applicable general plan policies as well as with applicable zoning designation and regulations.

(b) The proposed development occurs within city limits on a project site of no more than five acres substantially surrounded by urban uses.

(c) The project site has no value as habitat for endangered, rare or threatened species.

(d) Approval of the project would not result in any significant effects relating to traffic, noise, air quality, or water quality.

(e) The site can be adequately served by all required utilities and public services.

It is important to note here that because the CEQA process is meant to inform the approval process, the development plans must be evaluated for compliance with the exemption criteria as submitted—or in this case, as plans exist before you. The plans should not be evaluated with the anticipation that one or more of the reviewing bodies could interpret away or otherwise provide relief from a design or zoning rule. In other words, CEQA does not allow its process to be mitigated away.

The staff report identifies the following area where the development plans do not conform to the city's laws and regulations (design guidelines).

- The project does not comply with city requirements that the project is consistent with the secretary's standard for the protection of historic resources.
- The project does not comply with city landscaping requirement.
- The project does not comply with city build-to-line requirement
- The project does not comply with the city's building floor area limit.
- The project does not comply with parking requirements.

Thus, the project is not consistent with the city's zoning code in numerous ways, and therefore, does not satisfy criteria (a) of the In-Fill exemption.

The staff report notes that construction activities could cause traffic, noise and air quality effects, but offers permit conditions as mitigating measures. Again, this process does not conform CEQA law. The project could, and most likely will, result in significant effects relating to traffic, noise, air quality during the construction period and, therefore, does not satisfy criteria (d) of the In-Fill exemption.

This design review process is a project as defined by CEQA and does not qualify for an exemption; the city must now draft an initial study.

The Commission and the City should consider the CEQA process as a valuable resource for assuring that it has the broadest exposure to facts and ideas relating to projects under its consideration. Moreover, because the community will be involved in reviewing documents created under the CEQA process (likely an initial study with mitigating measures) the CEQA process promotes greater public exposures to and confidence in the approval process. The city's current process does not instill such confidence.

Some other issues presented by the staff report:

- Unless specifically provided for in a code section, city law does not provide for a “waiver” of code requirements. Deviation from code requirements must be allowed through the variance process.
- City law does not provide for the commission to delegate any of its design approval authority to staff using conditions of approval.
- Interpretation of code provisions is not a process for making the law fit a development project. It is a structured process to determine what the City Council intended when they enacted the code provision.
- The design approval process is quasi-judicial. The reviewing body must consider the facts presented and determine if the project complies with the codes, guidelines and general plan provisions. All decisions must be supported by evidence. On issues that require specific knowledge such as historic resource protection standards, the commission must seek expert advice. Otherwise, it will act arbitrarily if it attempts to resolve the issues on its own.

In respect to the historicity issues presented by the bank building, the commission should recall that the City Council left the decision on how to protect the bank building complex to the commission. In its resolution on the subject, it said:

This Determination of Consistency is further predicated on the following Recommendations and Draft Conditions of Approval being incorporated into the project, and accepted and approved by the City of Carmel-by-the-Sea Planning Commission as part of the discretionary permit and approval of the project:

The Commission may also wish to keep in mind that when the City Council proposed minimum mitigating measures it acted without benefit of expert advice on how the community room, its wall and the entire complex must be protected. In fact, they discredited the reports by its expert and the HRB by finding they didn’t agree with ether. Moreover, both reports only addressed the projects impact on the wall.

With respect to parking:

- The record contains no evidence that the applicant cannot engineer the excavation to protect the integrity of the community room. Also, there is no evidence that they could not move the garage entrance down the street. There is no evidence that the applicant has diligently sought to comply with the parking requirement, so the project does not qualify for the in-lieu exemptions.
- The bank building had several parking spaces that the project will consume. The HRB has some jurisdiction over this issue: Parking Reductions. On-site parking requirements for any continued occupancy, change, or intensification in use for any register-listed resources may be waived by the Board. In granting such waivers, the Board may establish that the number of parking spaces required shall be the same as

the number of spaces that exist on the property as of the effective date of listing in the register. CMC 17.32.100 (C).

- The restaurant use permit contains a specific on-site parking requirement, which the project will make unattainable.
- Depending on how they are configured, the inconvenience of parking lifts provides disincentives for their use. This suggests motorists will opt for on-street parking.
- The environmental impacts of the loss of current parking spaces and the loss of potential spaces that might use the in-lieu alternative issues should be one subject of a CEQA initial study.

Regarding the maximum allowed building floor area:

As far as I know, the commission has not officially and correctly interpreted the term, open space area, such that separate buildings are allowed to connect through second-floor balconies. During the Ulrika project approval process, the commission ignored the issue and approved the project with second floor connecting walkways.

To interpret the code section correctly, the commission must use a fully developed, structured process for determining what the Council intended when they used the words, "open space area". Without meaning to preempt the commission, I suggest that the Council probably intended that the phrase refers to another code section, which defines open space as follows: "Open space is an open area that is free of structures and is visually accessible from public ways or walkways." With this definition in mind, the next step would be to determine what the Council intended by the word structures, etc. The City Attorney can provide guidance here.

Landscaping:

The interpretation of open space is also relevant to landscaping. CMC 17.34.080 (A)(1) reads: "A minimum of 50 percent of the required open space on each site shall be landscaped." Locating 699 square feet of the required landscaping on a roof hardly fits the "free from structures and visually accessible from public ways or walkways" criteria in that definition.

Recommendations:

- Specifically determine that the project does not qualify for an exemption from the CEQA process.
- Instruct the staff to prepare an initial study of the project that conforms to CEQA requirements.
- Suggest that the initial study be simultaneously referred to the HRB and Planning Commission for review.
- Request instruction on the appropriate procedure for interpreting ambiguous wording in the code and design review requirements, as well as the Land Use and Community Character element of the General Plan.

- Encourage the applicant to conform its plans to all requirements of the code, design guidelines and General Plan provisions.

Steve Hillyard

cc: CBTS City Administrator
CBTS Director of Planning
CBTS City Attorney