2010-7048 - O’Brien Homes/Sunnyvale Associates LLC and TRE B of A v WL Homes: Architectural and landscaping modifications for a previously approved project. Previous project included 242 condominium townhomes and a tentative map, as a specific project component of the Duane ITR General Plan Amendment and EIR Study for a site located at 920 - 962 East Duane Avenue (APN: 205-55-001 through 040). SL

(Continued from June 28, 2010)

Kathryn Berry, Senior Assistant City Attorney, introduced Sunnyvale City Attorney David Kahn who is also involved in the project.

Steve Lynch, Senior Planner, presented the staff report. He said staff is recommending approval of the Special Development Permit subject to the Conditions of Approval in the staff report.

Comm. Sulser discussed with staff how the amended project, split in two, would affect the usability of amenities for the existing 14 units. Mr. Lynch said that when the 14 units are sold and can be occupied, that the units should have access to all the amenities with all units functioning as one community. Comm. Sulser asked if a condition needed to be added to assure that the 14 units are part of the community. Ms. Berry said a condition could be added, however all things that the project and future residents receive are included in the subdivision agreement. Ms. Berry said the Institutional Housing Partners (IHP) Capital has agreed to assume all of the obligations in the subdivision agreement which includes bonding for public improvements, and insuring that the utilities are constructed and the fees are paid.

Comm. Hendricks confirmed with staff will be a single project and asked staff to elaborate on the proposed parking including the proposed tandem parking, and the 70 on-street parking spaces. Comm. Hendricks asked staff to clarify the scope of tonight’s project with staff saying the Commission is considering the parking, architecture, and modifications to the clubhouse.

Mr. Kahn provided further explanation that originally this was a single project, which is the City’s preference. He said that the two applicants tried to resolve their differences, however they could not, and O’Brien Homes has been provided the option of modifying the application. He said any decision the Commission makes tonight, would affect only the O’Brien Homes, and not the 14 units. He said as a condition of allowing the Sunnyvale Associates to go forward, they have agreed to take on the amenities under the subdivision agreement. Mr. Kahn said the 14 units are not included in the project under consideration tonight, however when this project is built out, all 14 units should have full access to all amenities in the subdivision.
Chair Chang confirmed with staff that condition 8 requires a new subdivision agreement and assures that the 14 units would be a part of the subdivision.

Comm. Hungerford confirmed with staff that the existing 14 homes are being actively marketed. Staff further discussed that the build out of this project would be in phases, and eventually the units would merge. Comm. Hungerford clarified with staff that the Commission is considering the architecture for 228 units, modifications to the clubhouse in the common area, the architecture of the buildings, and the parking issues.

Chair Chang opened the public hearing.

Steve Zales, representing the applicant said O’Brien Homes is partnered with IHP for this project. He said they have worked hard for many months to get to this public hearing, have worked with staff to improve the plans, and are proud to have strong support of the San Miguel Neighborhood Association. Mr. Zales presented a PowerPoint presentation saying that there are three buildings already built. He said they are proposing about the same number of homes, buildings, circulation, and the same environmental impacts as approved in 2007. He said they are seeking to create five districts using different architectural styles and landscaping to create neighborhoods within the larger neighborhood which are described in the plans. He said one of the main changes from 2007, is the increase in the number of bedrooms, adding total of 30 bedrooms which has increased the parking requirement by 31 spaces. He said they have increased the size of the garages to include storage and tandem parking which should encourage residents to park in their garages. He said the proposal provides 3.1 parking spaces per unit where 2.4 spaces are required, though the tandem parking and on-street parking do not count toward the requirement. He discussed the proposed remodel of the inside of community center and the amenities that would be added.

Comm. Sulser discussed with the applicant the changes to the community center with Mr. Zales saying they are increasing the functionality by adding a fitness center, theater room, living room, wifi lounge, and an outdoor living room with a fireplace, while retaining a kitchen.

Comm. Hungerford discussed with Mr. Zales the awnings over some of the windows, and that they would be metal, painted to accent or match different treatments.

Comm. Dohadwala discussed with Mr. Zales why a swimming pool is not included with Mr. Zales saying the market research indicated most residents of this type of community would prefer to have lower Homeowner Association (HOA) dues than the increase that would be required for pool maintenance.
Comm. Hendricks discussed with Mr. Zales the internal and external changes proposed. Mr. Zales said the footprints are the same, the architecture is different due to changes in the garages, and the massing and quality are similar.

Vice Chair Travis discussed with the applicant whether the new subdivision agreement would include the 14 units accessibility to the common area facilities. Mr. Zales said they have tried for months to have all the units integrated including the 14 units. He said the owner of the 14 units has withdrawn from the application, and as it stands now, the two owners have not been able to reach an agreement. Mr. Zales said the proposed changes for their property only, as no agreement could be reached. Mr. Zales said it appears to him that the other property owner is not motivated to negotiate in good faith.

Comm. Dohadwala discussed with Mr. Zales the possibility of going the extra mile and getting this project green building rated. Mr. Zales said the prior project did not have the green building requirements and the amendments to the project are a big improvement, in regards to green building, over the prior approval.

Tom Sherwood, with Buchalter Nemer, Counsel for the receiver, said he has heard two separate answers regarding the integration of this project. He said staff said this is to be a fully integrated project with the remaining applicant taking responsibility, under the subdivision agreement, to complete all the work, making it so the 14 units are not orphans. He said Mr. Zales seems to be unclear whether there would be that level of integration. He said as recently as this past Sunday he saw a letter from IHP Counsel addressed to the Department of Real Estate (DRE) raising the issue of whether or not the 14 units have rights to use the clubhouse. He said they would be delighted to hear that IHP would takeover the responsibility for the subdivision work required for all 240+ units. He said the receiver has been unable to obtain Certificates of Occupancy (C of O) for the 14 completed units until certain work is performed on the IHP property or information is provided by IHP such as a phasing plan. He said the receiver has no ability to move forward with the sale of the 14 units as they cannot get C of O. He asked if the conditions imposed would require IHP to satisfy the requirements that would enable the receiver to obtain C of O, and when. He said it does not do them any good if the 14 units are the last units that can be occupied due to the absence of trash enclosures. He said the 14 units were built by choice with no trash enclosures and there is no place to put trash enclosures. He said their concern is the trash enclosures and the 14 units being that last units that could be sold. Mr. Sherwood said he has not seen information from anyone in the last several days that makes the information he has provided, inaccurate.

Taylor Grant, property owner, provided supplemental documents to the Commission as requested when this item was continued at the June 28, 2010 Planning Commission meeting. He said he did not receive anything in writing requesting that his concerns be provided to the Commission until a couple of days ago. Mr. Grant said he had
requested additional information from staff on June 25, 2010, prior to the continuation, indicating some of his concerns. He said the key issue he has tonight is whether the related projects will be one or two communities, saying he would like this project to be community. He said as background, he was appointed receiver in June of 2009, the City was informed of his presence at that time, and IHP knew that he existed. He said the 14 homes are now on the tax bills. Mr. Grant said this project has been challenging for multiple reasons, and in hindsight, that he could have done a better job, apologizing to staff and IHP. He said his responsibility is for the 14 units and Lot G. Mr. Grant showed a PowerPoint presentation and said preferred plans previously approved. He said inadequate parking could affect the value of his 14 units and that deviation from the code for parking should not be granted without good reason. Mr. Grant asked whether parking for his units has been taken into consideration. He said he would like to see the circulation plans for Lot G documented. He said the application for this project was made on January 27, 2010 and he was not made aware of the application until March 2, 2010. He said he spoke with staff, discussing what he owns, with Mr. Lynch informing him that his signature would also be needed for the application. He said he is confused how he was sidestepped in the application process. He said staff made it clear that this is an issue between two private parties, and he thinks that he and Saul Pinto need to work this out. He said he has gone through the documentation including the DRE documentation that says, “one association” and all he wants to do is get the C of Os for the 14 units, get them sold, get out of the way, get the declarants rights to IHP, and let them to build whatever they build.

Chair Chang asked Mr. Grant to clarify what his demands are. Mr. Grant said he wants one association, and a clear path for him to get the C of Os in a timely matter as he does not want his units to be the last units to get the C of Os.

Comm. Sulser clarified with Mr. Grant that C of O is the acronym for Certificate of Occupancy. Comm. Sulser asked Mr. Taylor what he thinks about the proposed change in unit types. Mr. Grant said his opinion is that he likes the architecture of the existing 14 units and would prefer to have the same architecture throughout the development as originally approved.

Comm. Hendricks asked Mr. Grant if he were provided the C of Os within a reasonable timeframe, would he care about the changed architecture. Mr. Grant said he would only care if his 14 units were towards the last to receive their C of Os.

Saul Pinto, applicant and a Principal and partner with IHP and owner of Sunnyvale Associates, LLC, said when he first met with Mr. Grant, they discussed that the architecture and bedroom count approved for the original project was flawed and needed to be fixed and that they had no interest in building the product previously approved. Mr. Pinto said since that time they have all gone through a tremendous process including being sued by the receiver and the judge’s ruling that they are entitled
to come to the Planning Commission to have the project considered and not be held up by the 14 units. Mr. Pinto said Mr. Grant’s opposition does not have anything to do with architecture, and is instead a dispute about who will pay the cost of improvements that benefit Mr. Taylor’s units. Mr. Pinto said IHP has taken responsibility for the subdivision improvements, and all of the Below Market Rate improvements. Mr. Pinto said Mr. Grant’s arguments about a single project are a smoke screen and by removing his application he has prevented this from being a single project. Mr. Pinto said IHP is proceeding with just their property and will continue to try to work with Mr. Grant to incorporate the 14 units into the project. He said the reason we are here tonight is to get the project approved and experience no more delay by reason of Mr. Grant’s demands. Mr. Pinto said they would try to incorporate the 14 units, however it is inappropriate to keep the 228 units on hold.

**Mr. Kahn** clarified that Sunnyvale Associates would accept responsibility for the improvements in the subdivision agreements, however it is important to note that they are assuming responsibility for the public improvements. He said the issue between Mr. Pinto and Mr. Grant has to do with the private improvements, which are not part of the subdivision agreement. Mr. Kahn said the issue that has not been resolved is the payment and division of costs, which has kept the application from moving forward as a joint application.

**Comm. Hungerford** discussed with staff examples of private improvements that would need to be built before the units could be occupied. Comm. Hungerford asked what is needed that is not covered by the subdivision agreement in order for the C of Os to be issued. Mr. Lynch said there is a short list of about 12 items to resolve at a cost of approximately $500,000, which the two developers do not agree on and have no bearing on application tonight.

**Comm. Sulser** confirmed with staff that the previously approved permit is still valid and if the Commission approves the project tonight, but the developer does not exercise the permit, that the developer has the option to build the old project reverting to the old building permits. Comm. Sulser confirmed with staff that the community clubhouse is already built and the proposal is to renovate the existing building.

**Comm. Larsson** discussed with staff the on-street parking, and the concern of setting a precedent of using public parking to justify a parking deviation. Mr. Lynch said, while 70 on-street parking spaces are available, this should not be the justification for a deviation. Mr. Lynch said staff thinks the proposed tandem parking spaces are justification for the deviation of 33 parking spaces.

**Mr. Zales** responded to Comm. Sulser’s comments and said they would not build the previously approved plans as they feel the style is no longer marketable. He said regarding the C of Os for the 14 units, which is the receiver’s main concern, that they
have spent a lot of time and offered options to the receiver to try and move forward on
the project. He said the options offered were not accepted by the receiver. Mr. Zales
said they would like the 14 units to be included in the project and the only issue causing
the hold up is the requirements the receiver needs meet to obtain the C of Os, which
should be paid for by the receiver. He said they have not been able to agree with the
receiver, and have to ask the Commission to approve the project on their own. He said
hopefully with that effort, a probable agreement can be reached. Mr. Zales said it is their
wish that the receiver sell the units as soon as possible for as much as possible, and
that they just want happy owners, with complete disclosures, that understand what they
are getting, hopefully, with one integrated Homeowner’s Association.

Comm. Hendricks discussed with Mr. Zales that IHP had made a good faith effort to
buy the 14 units, but eventually the offer was rejected.

Comm. Sulser discussed with Mr. Zales the clubhouse, which is completed, but needs
a lot of work to increase the functionality.

Comm. Hungerford discussed with Mr. Zales the Association issue and that hopefully
an agreement can be reached regarding the 14 units access to the amenities. Mr. Zales
said the receiver withdrew his participation in this application and obtained an order
from a judge prohibiting the applicant from doing anything on the receiver’s property.

Chair Chang closed the public hearing.

Chair Chang discussed with staff that there is not a condition requiring the applicant to
make sure the amenities are available to the future residents of the 14 units. Mr. Lynch
explained there are requirements tied to the building permits e.g., guest parking, trash
enclosure, and access to the site, that are holding up the final occupancy.

Comm. Hendricks discussed with the staff who needs to pay for the requirements for
the 14 units. Mr. Lynch said the requirements must be met before the C of Os will be
issued and the City’s standpoint is that the property owners need to collectively work
out who pays for the requirements.

Comm. Hungerford discussed condition 8 with staff saying the condition is for public
improvements, not the private improvements. Trudi Ryan, Planning Officer, said that
the private improvement items are not part of the purview of the Commission. Ms. Ryan
clarified that the Commission is considering the revised architecture of the 228 units,
revisions to the interior of the community building, and the deviation for parking that is
requested.
Vice Chair Travis moved for Alternative 1 to approve the Special Development Permit with the Conditions of Approval located in the report. Comm. Sulser seconded the motion.

Vice Chair Travis said this was an interesting public hearing with discussion on a wide range of issues, that comes down to a financial argument between two private parties. He said he likes the project and the five-district set up. He said he thinks the tandem parking spaces will make up for the parking deviation and he is confident that approving this development is serving the public benefit.

Comm. Sulser said he voted for original project and he thinks this is a good project too. He said he thinks the diversified architecture, and the improvements to the community building are good.

Ms. Ryan clarified that the Conditions of Approval are located in Attachment B, not A.

Comm. Hendricks said he would be supporting the motion and he likes the changes. He said he is concerned about the parking, however on the whole the changes are good for City.

Comm. Larsson said he would be supporting the motion as he was able to make the findings including the parking deviation without referencing the on-street parking. He said the large number of tandem parking spaces and the extra storage should encourage people to park in the garages.

Comm. Hungerford said he would be supporting the motion. He said he is willing to approve the architecture and he agrees with what has been said about the parking. He said he thinks that applicant has made a good faith effort to try to work with the receiver to make this project work as a single project.

Chair Chang said he would be supporting the motion though he liked the original project. He said he thinks the parking seems to be distributed well throughout the project, and the upgrades to the community building are good. He said he hopes the applicant and the receiver can work together as it would be in the best interest of the new residents to be protected and get what they pay for.

ACTION: Vice Chair Travis made a motion on 2010-7048 to approve the Special Development Permit with the Conditions of Approval located in the report. Comm. Sulser seconded. Motion carried 7-0.

APPEAL OPTIONS: This action is final unless appealed to City Council no later than July 27, 2010.