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July 31, 2020

VIA E-MAIL

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Re: Westport Project, Application Nos: DP-2018-05, ASA-2018-05, TM-2018-03, TR-2018-22, U-2019-03, EXC-2019-03 (EA-2018-04)
Council Meeting August 18-2020

Dear Mr. Martire:

This office represents the interests of the Applicant, KT Urban, for the Westport Project. The Project is deserving of City support on its merits, as it will be providing a variety of much-needed housing opportunities to the residents of Cupertino. But in addition, because this application is subject to many constraints imposed upon the City by State Law and the Cupertino City Code (to the extent it is consistent with State Law), we want to take this opportunity to spell out clearly the legal framework within which this application must be processed for approval. Please make this letter part of the record of the proceedings.

I. The Legislative Mandate – Interpret City Plans, Policies, Etc., in Favor of Housing.

The City's consideration of this Project is heavily constrained by two major State Housing laws, the Density Bonus Law (Govt. Code Sec. 65915) and the Housing Accountability Act (Govt.

Code Sec. 65589.5). Both of these laws prevent the City from denying, reducing density, or otherwise conditioning the Project in a manner that would hinder its ability to supply housing to the City.

Under both of these State laws, the Legislature has made it clear in a number of ways that all matters of interpretation are to be decided in favor of maximizing housing, particularly affordable housing.

First, both the Housing Accountability Act and the Density Bonus Law contain statements of Legislative intent. Thus, from the Housing Accountability Act:

> *"It is the policy of the State that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing."* (Sec. 65589.5(a)(2)(L)).

And from the Density Bonus Law:

> *"This chapter shall be interpreted liberally in favor of producing the maximum number of total housing units."* (Sec. 65915(r)).

Second, with regard to non-housing projects, a city has traditionally been given deference in the interpretation of its own General Plan, and ordinances. That deference is taken away in the Housing Accountability Act by recent amendments; now consistency for housing projects is found if a reasonable person would think that the project is consistent. Thus:

> *"For purposes of this section, a housing development project or emergency shelter shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent, compliant, or in conformity."* (Sec. 65589.5(f)(4)).

The next sections of this letter will demonstrate how the Project complies both with the Density Bonus Law and the Housing Accountability Act.

II. The Project Complies with the Density Bonus Law and is Entitled to a Density Bonus, Waivers of Development Standards, and Incentives/Concessions.

Staff has consistently acknowledged that the Westport Project is entitled to a density bonus of up to 35% because of its provision of affordable housing. The Project does not require the full 35% bonus, but is entitled to waivers and incentives/concessions for the Project as a whole, not just for any extra units added as a density bonus.

That this is the proper interpretation was made clear by amendments to the Density Bonus Law. Thus, the Density Bonus Law was amended to add into the definition of the term "density bonus" the concept that a density bonus can be, if the applicant so chooses, just a few or even zero units. The definition of "density bonus" now reads in relevant part:

> *"[D]ensity bonus" means a density increase over the otherwise maximum allowable gross residential density as of the date of application…or if elected by the applicant, a lesser percentage of density increase, including, but not limit to, no increase in density."* (Sec. 65915(f)).

Thus, all provisions of the Density Bonus law – including waivers and incentives/concessions – apply to the totality of the Westport Project, regardless of the actual density bonus requested.

Waivers

The waiver provision states:

> *"In no case may a city, county, or city and county apply any development standard that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) [affordability percentage) at the densities or with the concessions or incentives permitted by this section."* (Sec. 65915(e)(1)).

Since the Density Bonus Law amendments make it clear that the density "permitted by this section" can include the base density, even with zero bonus units, it is obvious that an applicant need not show that waivers are needed for the density bonus units themselves, but rather for the Project as a whole as designed by the applicant's architect.

Furthermore, the case law establishes unambiguously that the applicant does not have to establish that the project could not be built in some other way that would lessen the need for waivers. There is no authority that allows the City to look at alternate designs. This law was clearly established in the leading case of *Wollmer v. City of Berkeley* (2011), 193 Cal.App.4th 1329, 1347, in which project opponents challenged the grant of waivers, arguing that the project could have been redesigned to avoid the need for them. The Court rejected this challenge, holding that waivers must be granted for a development that meets the criteria of the Density Bonus Law, with the design and amenities chosen by the applicant, and that the design is not subject to second-guessing by opponents.

Incentives/Concessions

The Density Bonus Law also requires cities to grant incentives and concessions (hereafter, just "concessions") in addition to waivers. Incentives and concessions are defined as:

> *(1) A reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceed the minimum building standards approved by the California Building Standards Commission as provided in Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code, including, but not limited to, a reduction in setback and square footage requirements and in the ratio of vehicular parking spaces that would otherwise be required that results in identifiable and actual cost reductions, to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c).*

> *(2) Approval of mixed-use zoning in conjunction with the housing project if commercial, office, industrial, or other land uses will reduce the cost of the housing development and if the commercial, office, industrial, or other land uses are compatible with the housing project and the existing or planned development in the area where the proposed housing project will be located.*
>
> *(3) Other regulatory incentives or concessions proposed by the developer or the city, county, or city and county that result in identifiable and actual cost reductions to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c).* (Sec. 65915(k)).

As can be seen from this definition, the only requirement to be eligible for an concession is that it result in "identifiable and actual" cost reductions in the provision of the affordable units.

We had not originally applied for a concession primarily because the Cupertino Density Bonus Ordinance appeared to contain many more requirements than allowed by State law, which has been amended in recent years to reduce the documentation that can be required by a City. The information now permitted to be requested is stated right at the beginning of the Density Bonus Law, as follows:

> *"A local government shall not condition the submission, review, or approval of an application pursuant to this chapter on the preparation of an additional report or study that is not otherwise required by state law, including this section. This subdivision does not prohibit a local government from requiring an applicant to provide reasonable documentation to establish eligibility for a requested density bonus, incentives or concessions, as described in subdivision (d), waivers or reductions of development standards, as described in subdivision (e), and parking ratios, as described in subdivision (p)."* (Sec. 65915(a)(2)).

By contrast, the Cupertino Municipal Code, section 19.56.060, demands much more information, including a very detailed "project financial report", an appraisal report showing the value of the incentive or concession, and a use of funds statement, all to be peer reviewed by outside consultants. While these requirements may have been valid years ago when written, they are now prohibited by the Density Bonus Law.

When asked at the July 14, 2020 Planning Commission meeting why we had not applied for a concession from the BMR dispersal requirement , I explained that we had been concerned that the excessive and onerous demands of the existing ordinance could be used for purposes of delay by project opponents. We were assured on the record that the City knew the ordinance was invalid, that Vallco had submitted just a simple explanation for their request, and that if we would just do the same that would suffice.

After the meeting we reviewed the Vallco request, and it is indeed very simple, consisting of only two paragraphs justifying their request for a concession to save many tens of

millions of dollars on their 1201 affordable units. The City accepted Vallco's explanation justifying their request as adequate and in compliance with State law and the City's Ordinance, and granted the requested concession. For comparison purposes and completeness of the record, their request is attached hereto as Exhibit A and incorporated herein by this reference.

So, at the invitation of the Planning Commission and Staff, we are also asking to be considered for a concession to remove the condition of dispersal contained in the City's BMR Manual.

To be clear, our position on concessions is as follows:

1) No concession is needed from the dispersal requirements for because, with respect to the rowhouses/townhomes, it is not possible to build isolated senior affordable units, due to Federal and State requirements on senior housing. We had requested a waiver for such dispersal and Staff has consistently (since Fall 2018) agreed. With respect to Building 1, dispersal does not apply since Building 1 is a State-licensed Assisted Living facility, and is not market-rate housing subject to dispersal. My letter to the Planning Commission of July 13, 2020, incorporated herein by this reference, explains this reasoning further.

2) If the City believes dispersal does apply to Building 1, then a waiver can be granted as it is not physically possible to put the affordable rental units into the licensed assisted care facility in which all residents are required to pay for services such as meals, daily living care, etc.

3) If the City prefers not to grant a waiver, then a concession must be given for the reasons elaborated on in KT Urban's companion letter of July 31, 2020. In essence the cost of an affordable unit in Building 1 would be several hundred thousand dollars greater than in Building 2 (and this rationale applies even more strongly to the idea of building affordable units in the rowhouses/townhomes). Thus there are very clear "identifiable and actual" cost savings for the construction of the affordable housing, so the requirement of Section 65915(d) is satisfied.

The project is entitled to up to two incentives or concessions because it is supplying 20% affordable housing at very low and low income levels. (Sec. 65915(d)(2)(B).

The city is required to grant the concession unless it *"makes a written finding, based upon substantial evidence, of any of the following:*

> *(A) The concession or incentive does not result in identifiable and actual cost reductions, consistent with subdivision (k), to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c).*
>
> *(B) The concession or incentive would have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon public health*

> *and safety or the physical environment or on any real property that is listed in the California Register of Historical Resources and for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact without rendering the development unaffordable to low-income and moderate-income households.*
>
> *(C) The concession or incentive would be contrary to state or federal law."* (Sec. 65915(d).

These findings cannot be made for the Westport Project, so the requested concession must be granted.

III. The Housing Accountability Act Prevents the City from Denying, Reducing Density, or Otherwise Conditioning the Project to Make it Infeasible.

The Project is a "housing development project" that is subject to the Housing Accountability Act, Govt. Code Sec. 65589.5. Accordingly, the Project can only be denied, reduced in density or significantly conditioned based on objective standards in existence at the time the application was deemed complete.

Subsection (j) of the Housing Accountability Act is pertinent. It provides

> *(j) (1) When a proposed housing development project complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete, but the local agency proposes to disapprove the project or to impose a condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by a preponderance of the evidence on the record that both of the following conditions exist:*
>
> *(A) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. 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 the application was deemed complete.*
>
> *(B) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.*

In addition to Subdivision (j) quoted above, since the Project is an affordable housing project as defined in Subdivision (h)(3) of the Housing Accountability Act, its approval is also governed by the requirements of Subdivision (d) of the Act. In particular, under Subdivision (d) (2)(A) of the

Act a claimed inconsistency with the zoning ordinance or general plan cannot be used to make a finding of denial or to require reduced density.

There are also some helpful definitions in the Housing Accountability Act:

> (*7) "Lower density" includes any conditions that have the same effect or impact on the ability of the project to provide housing.*
>
> *(8) Until January 1, 2025, "objective" means involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official.* (Sec. 65589.5(h)(7)(8)).

Thus, under the Housing Accountability Act, the City cannot impose conditions on the Project that would have the effect of reducing the Project's ability to provide housing at the density and in the manner proposed by the Applicant.

III. **The CUP and HOC Exception Were Applied For Under Protest – they Cannot be Denied or Conditioned Adversely to the Project .**

Although we disagreed, Staff insisted that we file two additional applications before they would consider the application to be complete. These were (a) for a Conditional Use Permit to increase the base density from 25 du/ac to 30 du/ac; and (b) a Heart of the City exception regarding retail on Stevens Creek Boulevard.

We applied for both the CUP and the HOC exception under protest. Here's why they were not needed.

No Conditional Use Permit is Necessary

Staff's requirement for a CUP is based on an incorrect reading of the City's General Plan, and is contrary to the Density Bonus Law itself.

The Project as originally proposed in 2018 was for 204 units, a density of 25 du/ac. This had been based on direction received from the City's Planning Staff that the maximum density that could be achieved on the site should be based on the 200 Housing Units "allocated" for the site in the General Plan and the Heart of the City Specific Plan, even though the General Plan Land Use Map identifies the maximum density allowed for this site as 30 units per acre (which would allow 237 units).

However, after the application was submitted Planning Staff took the position that the maximum density allowed in the General Plan (i.e., 30 du/ac, not the 25 du/ac. that would follow from relying on the 200 units shown for the site in the General Plan) should serve as base maximum density for purposes of requesting density bonus waivers or concessions. Staff and your outside attorneys took the position that the site would not qualify for a density bonus or waivers under

the Density Bonus Law unless the application qualified for a density bonus by proposing a density of 30 units per acre.

Staff's position was that we could not get a density bonus for our original requested density (25 du/ac), but could not go to a qualifying higher density of 30 du/ac without obtaining a conditional use permit to authorize the change from 25 to 30 du/ac.

However, this position clearly violates the State Density Bonus Law, which states categorically that a discretionary permit cannot be required in order to obtain a density bonus. (Sec. 65915(f)(5)). In effect, we were told that the use permit is not being required to obtain the density bonus – but that is the exact effect of Staff's stated position: we cannot get a density bonus unless we develop at 30 units per acre, but we cannot develop at 30 units per acre without a discretionary use permit. This interpretation would place the developer in an unacceptable Catch-22 situation.

The position that a CUP is required is also is a misinterpretation of the City's own plan. As quoted above, the Density Bonus law provides that a density bonus means "a density increase over the otherwise maximum allowable gross residential density…" (Sec. 65915(f)). And the phrase "maximum allowable residential density" means:

> *"the density allowed under the zoning ordinance and land use element of the general plan, or, if a range of density is permitted, means the maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project. Where the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan, the general plan density shall prevail."* (Sec. 65915(o)(2)).

In this case, the General Plan Land Use Map shows the Oaks as a Priority Housing Site. The legend to the Land Use Map states that such sites "shall have the densities shown in the Housing Element unless allowed a different density with a State Density Bonus…" Thus, the General Plan tells the reader to look to the Housing Element to see what density is shown for the site.

In the Housing Element, Table HE-5 lists the five Priority Housing Element Sites, of which the Oaks is identified as Site A3. The only reference to density in the Housing Element is contained in this table. Under the heading "Max Density (DUA)" for the Oaks, it says "30." Thus, the density allowed by the General Plan for the Oaks is 30 dwelling units per acre, not 25 or some other number. It is true that another column in Table HE-5 lists 200 as the "Realistic Capacity (units)" for the Oaks, but that is not stated, and cannot be interpreted reasonably, as a density figure. As noted in your outside attorney's letter to us of Aug. 10, 2018, "that figure is not a limitation on development, but rather an estimate for purposes of demonstrating that the City has adequately zoned land to accommodate its share of regional housing needs."

In order to move forward, we did apply for the Staff-demanded CUP, under protest. Because of the application of the Housing Accountability Act and the Density Bonus Law to this Project, the City lacks discretion to deny the CUP, reduce density, or impose other conditions that would impact the ability of the Project to provide housing at the density proposed.

Finally, we do not think our reading of the General Plan is actually inconsistent with the development standard in the Heart of the City Specific Plan. But if it is, then since the HOC acts as the zoning for the property, any inconsistency must be decided in favor of the General Plan. See *Wollmer v. City of Berkeley*, 193 Cal.App.4th 1329, at 1344. Or, if the development standard in the HOC is interpreted as creating a "range" of densities, then under the Density Bonus Law, clearly the applicant is entitled to propose, without discretionary permit requirement, a density at the top end of the range.

The Heart of the City Exception is not Required

The HOC provides that of the permitted commercial uses, those "that do not involve the direct retailing of goods or services to the general public shall be limited to occupy no more than 25% of the total building frontage along Stevens Creek Boulevard and/or 50% of the rear of the building." We understand this requirement of the HOC to be that of the actual building commercial frontage, only 25% along Stevens Creek may be non-retail commercial (as opposed to retail commercial). The amount of commercial space that will be built as part of the Project is clearly indicated on the plans. The City may incorporate the requirements quoted above as a condition of approval. The actual division, if any between retail commercial uses and non-retail commercial uses would be determined when the commercial spaces are occupied by tenants.

Staff's interpretation of the HOC Plan was that 75% of *all* frontage along Stevens Creek Boulevard, even that portion of this Project that would be in Rowhouses or Townhomes, needed to be devoted to retail. This is an obviously incorrect reading of the HOC Plan, and would fail the "reasonable person" interpretation test under the Housing Accountability Act. Nonetheless, at Staff's insistence, we applied for the exception under protest.

As with the CUP discussed above, because of the application of the Housing Accountability Act and the Density Bonus Law to this Project, the City lacks discretion to deny the Exception, reduce density, or impose other conditions that would impact the ability of the Project to provide housing at the density proposed.

Five-Hearing Limitation

SB330 has placed a limit of five on the number of hearings allowed to a city in processing a housing development project. Thus, pursuant to Government Code Section 65905.5, *"if a proposed housing development project complies with the applicable, objective general plan and zoning standards in effect at the time an application is deemed complete, . . . a city . . . shall not conduct more than five hearings . . . in connection with the approval of that housing development project."*

The term "hearing" is defined very broadly:

> *"Hearing" includes any public hearing, workshop, or similar meeting conducted by the city or county with respect to the housing development project, whether by the legislative body of the city or county, the planning agency established pursuant to Section 65100, or any other agency, department, board, commission, or any other*

> *designated hearing officer or body of the city or county, or any committee or subcommittee thereof."* (Sec. 65905.5(b)(2)).

The Council hearing set for August 18, 2020 will be the fifth hearing on this Project. Thus, the Council may not continue the hearing nor send the matter back to the Planning Commission for further review.

Conclusion

In summary, this is an exemplary Project that will revitalize an inefficient, aging shopping center, and transform it into a variety of needed housing types for the City – including market rate for-sale rowhouses and townhomes, senior affordable rental units, and assisted living and memory care facilities, along with ancillary retail uses.

It deserves support and approval on its merits. And State law mandates its approval.

Very truly yours,

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Exhibit A

This is the Vallco Project's justification for their requested concession (from their Supplemental Submittal dated June 19, 2018, found on the City's website).

"As for the concession eliminating certain design requirements for below market rate units, cost reductions will be achieved as follows:

•First, the BMR units are smaller than the comparable studio and 1-bedroom market rate units because building units of a smaller area reduces costs. EPS also reported last week that for every square foot of BMR unit developed, the developer realizes a straight loss of $250 to $300 (which we believe to be much too low). Using the mid-range loss of $275 per square foot, a 527-square foot 1-bedroom BMR unit would result in $92,400 less loss than an 863-square foot 1-bedroom. Further, the rent for BMR units is set by unit type, not sizes, so if larger area BMRs of a certain unit type were built, the additional loss would not be offset by any increased rental income.

•Second, BMR units are limited to studios and 1-bedrooms and do not include units with two or more bedrooms, which also achieves cost reductions. Of course, units with more bedrooms are by necessity larger, which increases cost and loss. In addition, while BMR units with a greater number of bedrooms allow for nominal rent limit increases, such increases are not commensurate with the incremental project costs resulting from the additional areas built. For example, according to the most recent rent limits published by the City, a 1-bedroom BMR unit affordable to the very low-income level can be rented for $1,195 per month, and a 2-bedroom BMR unit affordable to the very low income level can be rented for $1,344 per month. Based on the $275 loss per square foot and an estimated 250 square foot difference between a 1-bedroom and a 2-bedroom, loss resulting from providing the 1-bedroom would be less by approximately $68,750, while rent would only be $149 per month less than the 2-bedroom (which avoids an abnormally low 2.6% return-on-cost).

For these reasons, eliminating certain below market rate design requirements will result in cost reductions for the Project that will allow for the construction of the Project's affordable housing."