KT URBAN

July 31, 2020

VIA EMAIL ONLY
Gian Martire, Senior Planner
Planning Division
City of Cupertino
10300 Torre Avenue
Cupertino, CA 95014-3255

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 8-18-20

Dear Mr. Martire:

I am writing on behalf of the Applicant, KT Urban, and also the proponents of the Assisted Living Care facility (a State-licensed Residential Care Facility for the Elderly), Atria Senior Living and Related California. The letter is signed by all three companies and presents facts and information from all three of us. We ask that this letter be entered into the record of these proceedings.

It was strongly suggested to us at the Planning Commission meeting of July 14, 2020 by the Planning Commission, Staff, and your outside attorney to add to our application for waivers under the Density Bonus Law, an application and justification for the furnishing of a concession from the CIty's BMR dispersal policy. Accordingly, this letter will discuss both waivers and concessions, so that we can be sure that we have furnished adequate information to you for the Council to approve the requested waivers, as well as potentially a concession from the dispersal policy.

The legal framework under which the City must evaluate the project application is explained more fully in numerous letters in the record, including a letter from our attorney, Andrew L. Faber, dated July 31, 2020.

<u>Need for Waivers to Accommodate the Project as Designed</u>

Waivers were requested for the original project and continue to be requested for the Enhanced Senior and Family Living project. The design justification for the waivers was summarized in two letters that are in the record, and that are incorporated herein by this reference: (1) Letter from Andrew L. Faber to Gian Martire dated September 5, 2019; and (2) Letter from the Project Architect, Steven Ohlhaber of C2K Architects, to Gian Martire dated June 25, 2020. Note that those two letters explain the need for the waivers of height and slope setback. The third waiver, that of dispersal of affordable senior units, was agreed upon by Staff as needing no additional explanation. The original explanation for the need for such waiver was contained in a Letter from Andrew L. Faber to the City's outside lawyer, Eric S. Phillips, dated November 30, 2018, also in the record and incorporated herein by this reference.

For the Enhanced Senior and Family Living Project, similar reasons apply even more strongly, as the Architects by redesigning Building 1 and adding another floor to Building 2 have managed to provide an additional 52 senior living units (including nine more affordable units).

Support for the Only Waiver Finding That the City must Make

The primary finding that must be made by the City is the one based on the Government Code Section 65915(e)(1):

Finding. The development standards requested to be waived "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."

Support for Finding. The Enhanced Senior and Family Living Proposal would contain 29 Very Low Income units (in addition, of course, to 19 Low Income units). As a percentage of the base maximum allowed density (237 units), this is 12.2%. That percentage, according to the Density Bonus Law (Govt. Code Sec. 65915(f)(2)) and the Cupertino Density Bonus Ordinance (Sec. 19.56.030), would allow a density bonus as high as 35% (i.e., 83 units). The proposal is for a density bonus of 57 units, well within the allowed range.

As stated above, the Project Architect has explained in his letters the reasons why the original project required height and slope setback waivers, and why the Enhanced Senior and Family Living Proposal also requires such waivers. Without supplanting his letters, a summary of the factors that justify the need for waivers follows:

For the Enhanced Senior and Family Living Proposal, the need for the waivers for height and slope setback is a result of the Project design, which in turn is governed by a variety of factors; thus, the Project is a mix of housing and retail, determined by code, site, and market factors, that creates a viable project for development at the requested increased density. It represents a housing program that responds to market demands for affordable and market rate units and presents a variety of living options, ranging from assisted living and memory care units to studios, one-bedroom and multi-bedroom units. A summary of some of its salient features includes:

- Providing 294 units, including 27 memory-care units and 48 BMR Age-Restricted Senior Apartment units (increased from 39 Age-Restricted Senior Apartment units in the original project).

- The Height increases for Buildings 1 and 2 allow an increase to the density of the site, primarily in the southeast corner. This density allows the Project to offer a mix of housing choices and affordability that will permit the viability of the development as a whole. Some of the factors that affect this viability are:

  - Product Mix: The Westport Cupertino Project provides a supportable and focused product mix that responds to the housing shortage and housing market currently faced by the City of Cupertino. It provides Below Market Rate Age-Restricted Senior Apartment housing as well as 88 units of Single Family housing. By adding height to Buildings 1 and 2, and increasing building density, the numbers of both market rate Assisted Living and below market rate Age-Restricted Senior Apartment units are increased. The rowhouse/townhome component is also essential to the development, as it provides a broader range of housing that will be occupied by people of all ages.

  - Construction Efficiency: By constructing Buildings 1 and 2 as taller structures, efficiencies in construction are created. Multiple floors comprised of stacking units, with a consolidated parking garage, building support systems, common areas and amenities, utility connections, trash rooms, elevators, and reduced building skin area are elements that denser developments achieve to provide construction savings and impact project viability.

  - Increased Number of Housing Units: The change of Building 1 from a multi-family project to a building comprised of State-licensed Senior Assisted Living units adds 54 additional units over the base density. This number includes the relocation of nine BMR units from Building 1 into Building 2, giving Building 2 a total of 48 Age-Restricted Senior Apartment BMR Units. The increased number of senior units in each building allows the project to attract top national development and management firms for both the Age-Restricted Senior Apartment building (Building 2) and the State-licensed Assisted Living community (Building 1).

  - Consolidating the State-licensed Assisted Living Units in Building 1 and the Affordable Age-Restricted Senior Apartment Units in Buildings 2: New housing that is developed as senior housing is, by law, subject to specific design accessibility regulations which encourage social contact. There are also rules and restrictions on non-senior occupancy, as well as policies and procedures, and marketing requirements. For these requirements to be met, the senior units must be integrated into the appropriately designed Senior Housing Buildings 1 and 2. Furthermore, Building 1 will be operated as a State-licensed Senior Assisted Living community. Building 2 will be operated as an affordable (BMR) Age-Restricted Senior Apartment building. A State-licensed, Assisted Living Facility has additional regulatory requirements beyond those applicable to an affordable Age-Restricted Senior Apartment building. For a regulated Assisted Living Senior facility, the service offering, operating costs and logistics, additional facility requirements and financing aspects create physical and financial obstacles that require this population to be separated, and therefore consolidated in Building 1. The affordable Age-Restricted Senior Apartment units will be consolidated in Building 2.

- Retail Viability: Positioning a greater number of residents immediately adjacent to retail will provide the opportunity for more support of the retail by Westport Cupertino residents, and thereby reduce the need for reliance on commuters to the site to generate retail sales. There will be clear opportunities to place senior-focused retail in the same complex. This will permit the seniors residing in the complex to easily walk to retail shops and services, and it will encourage seniors who frequent the Cupertino Senior Center on the east side of Mary Avenue to visit the retail shops at Westport Cupertino. The southeast corner of the Westport site is the main access point to the site for public transportation, vehicles, and pedestrians. Concentrating retail here provides the best opportunity for it to become financially viable.

- A "Walkable" Community: Creating a greater concentration of senior residential units at the eastern hub of the site promotes walkable access to the retail stores, nearby amenities (such as the adjacent park and Senior Center, the pedestrian crossing to DeAnza college, public transportation, and the bike route). The need to use one's own vehicle is reduced when there are nearby community resources within close proximity. It also helps to integrate seniors with the community by having immediate amenities to which they are able to walk. Feelings of isolation are reduced, permitting seniors to enjoy improved quality of life. These social elements create a more desirable location both for seniors and families.

The Project Architect has calculated that without the height and slope waivers, a total of 102 senior units, including 18 senior Below Market Rate units, would not be able to be constructed. This would be a reduction of approximately 50% of the project's senior units. The loss of these units would no longer make the Assisted Living and affordable Age-Restricted Senior Apartment components feasible; it would not provide the density required to make the proposed retail viable and the Project could not and would not be built. Additional detail is provided in the C2K letter dated June 25, 2020.

In order to deny the requested waivers, the City would have to make one of the following three findings, which cannot be made (Govt. Code Sec. 65915(e)(1)):

Finding for Denial 1. That the waivers would have an adverse impact on real property listed in the California Register of Historic Resources.

Reasons this finding cannot be made. There are no affected Historic Resources in the vicinity. Thus, there would be no substantial evidence to support this finding.

Finding for Denial 2. That the waivers would have a specific, adverse impact upon public health or safety or the physical environment, and there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact without rendering the residential project unaffordable to low and moderate income households. For the purpose of this finding, "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 application for the residential project was deemed complete.

Reasons this finding cannot be made. The Project will not have any significant, quantifiable, direct, and unavoidable impacts, based on objective, identified, written public health or safety standards, policies, or conditions as they existed on the date that the application for the residential Project was deemed complete. Thus, there would be no substantial evidence to support this finding.

Finding for Denial 3. That the waivers are contrary to state or federal law.

Reasons this finding cannot be made. The requested waivers are not contrary to state or federal law. Thus, there would be no substantial evidence to support this finding.

Incentives/Concessions under the Density Bonus Law

KT Urban had not applied for any incentives or concessions under the Density Bonus Law primarily because the Cupertino Density Bonus Ordinance (CMC Chapter 19.56) contains 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. This is detailed further in the letter from our attorney to you dated July 31, 2020. When asked at the July 14, 2020 Planning Commission meeting why we had not applied for a concession from the BMR dispersal requirement, our attorney 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 (involving savings of tens of millions of dollars by reducing the size of their affordable units), and that if we would just make a similar showing, that would suffice. The Planning Commission recommendation for denial of the project was essentially on the basis that no financial information was available to support a concession for dispersal.

Accordingly, while our legal position is that no incentive or concession is required for the reasons stated in Mr. Faber's letter, we are now asking that the City grant a concession from the dispersal requirement for BMR units, to allow the relocation of the nine BMR Senior Apartment units from Building 1 to Building 2. This letter provides the City the economic justification for that concession.

Concessions are defined in part (see Sec. 65915(k) for complete definition) as: "*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)(3)).

For Westport, the requested concession to allow the nine BMR Senior Apartment units to be relocated to Building 2 is justified both by the reduced costs of constructing them in Building 2 as opposed to Building 1, and also by the reduced service and operational costs in Building 2 versus Building 1. These reduced costs qualify as "identifiable and actual cost reductions" both "to provide for affordable housing costs" and also "for rents for the targeted units." Thus they satisfy both of the criteria of the Density Bonus Law.

The Applicant has executed a letter of intent with Related/Atria for the construction of Building 1 at Westport Cupertino. The Applicant is proposing that Building 1 consist entirely of a market rate State-licensed Assisted Living community that will contain 158 units with a mix of assisted living and memory care services. The building design and the level and type of care provided to the residents of this building are unique to the Project. This type of community is licensed by the State of California and is subject to a highly restrictive body of laws and regulations requiring that certain services be provided to protect the general health and safety of its residents.

Based on estimates provided by Related/Atria, the total project cost for the construction of Building 1 is approximately $129,500,000, or approximately $820,000 per unit. The main driver of the total project costs are hard construction costs and the largest variable here is building typology. The State of California requires this building to be constructed as Type I or concrete due to the physical limitations of the building's residents. Type I construction costs are significantly higher than for wood-framed construction, which is typically used for multi-family/apartment construction. According to the Terner Center on Housing Innovation at UC Berkeley in its March 2020 publication entitled "The Cost of Affordable Housing Production," Type I projects require more steel and concrete than wood frame buildings and therefore see higher material costs.

By comparison, Building 2 is a traditional affordable Age-Restricted Senior Apartment building. Building 2 will be constructed of wood frame over a podium, which will substantially lower the total project costs. The Applicant has been working with both Related California and Bridge Housing, a leading non-profit affordable housing provider in the Bay Area, on the design and construction of Building 2. Bridge has developed or acquired approximately 4,500 units of Age-Restricted Senior Apartments throughout California and Oregon. Bridge has approximately 2,500 units in the development pipeline and has been in constant contact with general contractors during the current COVID crisis. Bridge estimates the total project cost for 48 affordable senior apartment units at $29 million or approximately $620,000 per unit. As you can clearly see, while still expensive, the total cost per unit is roughly $200,000 less per unit in Building 2 than in Building 1. The total cost savings of providing the nine affordable units in Building 2 versus Building 1 would be approximately $1.8 million.

An additional factor reduces the per unit cost of the affordable units if built in Building 2 instead of Building 1. That factor is that Building 1, because it is a State-licensed Assisted Living community, requires considerably more square footage devoted to common amenity spaces (e.g., the dining area and kitchen) and "back-of-house" administrative and staff spaces than Building 2 does, based on the state-licensure required services. These additional common area spaces significantly add to the cost per unit of each living unit in Building 1.

With regard to reductions in achieving affordable rentals, Related/Atria confirm that if the nine Age-Restricted Senior Apartment units were located in Building 1, the project would incur the additional cost of providing those residents with licensure-required services such as dining and housekeeping, etc., without any additional compensation beyond the stipulated affordable BMR "rent," which is just defined in State Law and the Cupertino Code as covering space rent for the premises. They estimate that the increased cost of services for each such unit in Building 1 would be several thousand dollars per resident per month, over and above the allowed affordable space rent.

There are additional financing reasons why it is not feasible to include the nine BMR units in the State-licensed Assisted Living building. Atria has confirmed that the Low Income Housing Tax Credit program (the primary funding mechanisms for affordable housing) could not be utilized to support the affordable units in Building 1. If the affordable Age-Restricted Senior Apartment units are consolidated in Building 2, the Low Income Housing Tax Credit program can be used to subsidize all of the affordable units, thus providing additional financing for the Project.

Finally, the complexity associated with affordable housing funding streams should not be underestimated. According to the Terner Center's study noted above, the need for multiple sources of capital normally adds significantly to development costs for affordable housing. Market rate projects typically require project equity and construction financing from a bank. Affordable housing projects require a much more diverse capital stack to fill the funding gap between low income rents and total project costs. A typical affordable housing project is in competition with many other such projects for limited financing. A single project may need to have support from numerous different sources of capital before construction can begin. Although difficult to quantify, transitioning the nine units from Building 1 to Building 2 will reduce the complexity of financing the deal and ultimately result in lower building costs, (i.e., result in "identifiable and actual cost reductions").

Phasing of Construction

We understand that the City may have concerns about the timing of the construction of Building 2, since that building will contain all of the Project's affordable units. Staff had proposed a Condition of Approval that would have read as follows:

"CONSTRUCTION PROJECT PHASING
Prior to issuance of the first grading and/or building permits, the applicant shall prepare a construction schedule, and shall demonstrate the ability to complete the project on or before

the project expiration date. The construction phasing schedule shall detail critical milestones of the construction. Critical milestones of the construction shall include but not be limited to the following:

a. *Prior to granting a certificate of occupancy for Buildings 1 and 2, the street and sidewalk improvements along Stevens Creek Boulevard and the street and sidewalk improvements along the interior roadway for Parcels 1 and 2 shall be completed to the satisfaction of the City, and approval of the foundations shall be obtained for at least 50% of the townhomes and rowhouses approved for Parcel 2.*

b. *Timing of the completion of Building 2 to be concurrent with or prior to occupancy of Building 1.*

This kind of condition is unacceptable, as it will make Building 1 impossible to finance and build. Related/Atria confirm by this letter that based upon their extensive experience in real estate development they believe it will be impossible to obtain financing for Building 1 with such a condition. This is because a lender will not finance the construction of a building (which is the lender's collateral) that cannot be opened until a separate affordable housing building is first constructed. As stated above, it is well known that financing for affordable projects is complicated and competitive, and that it often takes a long period of time to arrange.

Thus, the effect of this or a similar condition would be to prevent the project from being built at the density proposed, since Building 1 cannot be financed with the phasing condition. This is the equivalent of a denial of the Project under the Housing Accountability Act, Section 65589.5(d) or the approving it at a lower density within the meaning of the Section 65589.5(j). Note that under the 2019 amendment to the HAA: "lower density" is defined to include "any conditions that have the same effect or impact on the ability of the project to provide housing." (65589.5(h)(7)).

Likewise, any restriction on the building or occupancy of the rowhouses/townhomes would similarly have the effect of preventing or hindering the construction of the affordable units in Building 2. This is because there is a substantial gap in the financing of Building 2. Even with the land being contributed to the affordable housing developer for Building 2 at no cost, there is a substantial gap – several million dollars – between the construction costs of Building 2 and the value financeable based upon the restrictions of affordable rents. This gap will be filled in the project by contributions from KT Urban, using cash generated from the sale of the rowhouse/townhome portion of the project. Thus, any restriction on the timing of the construction or occupancy of that portion of the Project would have the effect of making the affordable building infeasible to construct.

Accordingly, imposition of such a condition would violate the Housing Accountability Act. We would agree, however, that the residential portion of Building 2 be clearly designated in a COA as being restricted to Age-Restricted Senior affordable housing, as we have proposed.

Conclusion

We believe that the Westport Project is highly deserving of Staff and Council support and look forward to positive Council actions at the meeting. We would be happy to supply any further information that might be helpful or to answer your questions.

Very truly yours,

KT Urban	Atria Senior Living	Related California
Mark Tersini	Randy Bekerman	Matthew Witte, Principal

cc:
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