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TYLER A. SHEWEY
JAMES F. LANDRUM, JR.

TEN ALMADEN BOULEVARD
ELEVENTH FLOOR
SAN JOSE, CALIFORNIA 95113-2233

TELEPHONE: (408) 286-5800
FACSIMILE: (408) 998-5388

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JEFFREY S. KAUFMAN

OF COUNSEL

STEVEN L. HALLGRIMSON
FRANK R. UBHAUS
RALPH J. SWANSON

NANCY L. BRANDT
LESLIE KALIM MCHUGH
BRADLEY HEBERT

April 22, 2020

Kitty Moore, Chairperson
and Planning Commissioners
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)

Dear Chair Moore and Commissioners

This office represents the interests of the Applicant KT Urban, for the Westport Project. 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.

Desired Project – Enhanced Senior and Family Living Project

The project as originally proposed consisted of a base of 237 units plus five density bonus units, and included 39 affordable senior apartments. In response to requests to add more units, the Applicant has created the Enhanced Senior and Family Living proposal, which is now the preferred project. This proposal is built in the same footprint as the original project, but now features an additional 52 senior units including nine more BMR affordable senior units.

The Enhanced Senior and Family Living proposal is fully analyzed in the project Environmental Impact Report. The EIR concluded that neither the original project nor the Enhanced Senior and Family Living Proposal would have any significant, unmitigated environmental impacts, and either can legally be approved.

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ALF/24070-001

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.” (Govt. Code 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.” (Govt. Code 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 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.” (Govt. Code 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 and Waivers of Development Standards.

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Background on Density Bonus Law

Before discussing the appropriate findings for the City to make, we want to be sure that there is no confusion as to the basic entitlement for waivers of development standards under the Density Bonus Law. Staff had earlier asked us for a justification of why the waivers are necessary to build the five originally requested density bonus units. But that is not the correct question to ask. Cities that wanted to restrict housing by interpreting the Density Bonus Law as narrowly as possible used to ask that question, but recent changes to the Density Bonus Law have clarified that the proper inquiry is as to the necessity for the waivers in order to build the project (not just the bonus units) at the density and with the amenities requested by the developer and allowed by the Density Bonus Law.

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 limited to, no increase in density.” (Govt. Code Sec. 65915(f)).

And 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.” (Govt. Code Sec. 65915(e)(1)).

Since the 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.

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Need for Waivers to Accommodate the Project as Designed

Waivers were requested for the original 242-unit 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 April 26, 2019. 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 have managed to provide an additional 52 senior living units (including nine more affordable units) into the same building envelope as before. These reasons are detailed in a letter from Steven Ohlhaber to Gian Martire dated April 22, 2020, incorporated herein by this reference. A summary of these reasons is given below.

Support for the Only 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. 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 Municipal Code (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 maximum.

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

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studios, one-bedroom and multi-bedroom units. A summary of some of its salient features includes:

- Providing 294 units, including 48 BMR Senior Living Housing units.
- The number of BMR Senior Living Housing units has been increased from 39 units in the original project to 48 units.
- There is a broad mix of housing that provides a variety of housing types:
 - Seventy percent (70%) of the total units are multifamily, including one- and two-bedroom flats and memory care/life guidance units; 30% are rowhomes and townhomes; 16% of the total are Very Low Income and Low Income BMR Senior Living Housing Units;
 - This program of housing/ size of units is necessary to create a financially viable project.
- Higher density housing and retail are concentrated on the eastern end of the site. This does the following:
 - Creates walkable access to retail and the ability to readily support retail that can service the on-site population;
 - Creates walkable access for BMR Senior Living Housing units to the Cupertino Senior Center;
 - Creates walkable access to the on-site Central Green as well as the adjacent Cupertino Memorial Park;
 - Places a high concentration of housing at main point of site access – encouraging use of public transportation (bus stop at corner) and walking or cycling to get to neighboring sites;
 - Puts underground parking in one location and reduces soil off-haul by having one garage for multiple buildings;
 - Allows for transitioning to smaller scale residential on remaining portion of the site;
 - Uses height as a locating feature to demark the starting point of the Heart of the City at the first major intersection that provides for pedestrian and vehicle access to the site (Mary Avenue and Stevens Creek Boulevard).

The Project Architect has calculated that the Project cannot be built if Buildings 1 and 2 were limited to 45 feet in height. Limiting the height of Building 1 to 45 feet would directly eliminate 64 senior units from the Project, plus another 4 units to relocate the amenity terrace to a lower floor. Limiting the height of Building 2 to 45 feet would directly eliminate nine BMR senior units from the project.

This would represent a loss of 77 units, over a quarter of all units proposed for the Project and 37% of the senior units proposed. This would bring the Project below the density allowed by the

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General Plan. The loss of these units would no longer make the senior living and affordable senior living components feasible; it would not provide the density required to make the proposed retail viable, so the Project could not and would not be built.

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.

III. **The Housing Accountability Act Prevents the City from Denying, Reducing Density, or Otherwise Making the Project Infeasible.**

The Project is a "housing development project" within the meaning of 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 most 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

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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.

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)).

IV. The CUP and HOC Exception Were Applied For Under Protest – they Cannot be Denied of 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.

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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 attorney 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.

So 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. (Govt. Code 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." (Govt. Code 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

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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 both the Housing Accountability Act and the Density Bonus Law apply to this Project, the City lacks discretion to deny the CUP, reduce density, or impose other conditions that would significantly impact the Project.

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 require that of the actual proposed building commercial frontage along Stevens Creek Boulevard, 75% must fit the category of “direct retailing of goods or services to the general public.” The location of the 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 that are in the category of direct retailing of goods or services to the general public versus those that are not in that category would be determined when the commercial spaces are occupied by tenants.

Staff’s interpretation of the HOC Plan was that 75% *all* frontage along Stevens Creek Boulevard, even that portion of this Project that would be in rowhomes or townhomes, needed to be devoted to direct retailing of goods or services to the general public. 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.

V. Conclusion.

In conclusion, the Enhanced Senior and Family Living Project is entitled to City support. It will revitalize an aging site and provide a variety of much needed housing, along with appropriate

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commercial uses. Because the proposal complies with the State Density Bonus Law and Housing Accountability Act, it must be approved.

We look forward, accordingly, to your recommendation of approval for the Enhanced Senior and Family Living Proposal. Please feel free to contact the undersigned for any questions as to the content of this letter.

Very truly yours,

BERLINER COHEN, LLP

A handwritten signature in black ink, appearing to read 'A. Faber', with a stylized flourish extending to the right.

ANDREW L. FABER

E-Mail: andrew.faber@berliner.com

cc:

Mayor and Councilmembers
Gian Paolo Martire
Deborah Feng
Heather Minner, Esq.
Ellen Garber, Esq.
Mark Tersini
Laura Worthington-Forbes
Steven Ohlhaber