



Conditional Use Authorization Appeal

3832 18th Street

DATE: June 16, 2023
TO: Angela Calvillo, Clerk of the Board of Supervisors
FROM: Rich Hillis, Planning Director – Planning Department (628) 652-7411
Elizabeth Jonckheer, Principal Planner – Planning Department (628) 652-7365
Jeff Horn, Case Planner – Planning Department (628) 652-7633
RE: Board File No. 230634, Planning Case No. 2020-001610CUA-02
Appeal of Conditional Use Authorization for 3832 18th Street
HEARING DATE: June 27, 2023
PROJECT SPONSOR: Ryan J. Patterson, Patterson & O’Neill, PC
600 California Street, 11th Floor, San Francisco, CA 94108
APPELLANTS: Athanassios Diacakis, 3830 18th Street. San Francisco, CA 94114

INTRODUCTION

This memorandum and the attached documents are a response to the letters of appeal to the Board of Supervisors (“Board”) regarding the Planning Commission’s (“Commission”) approval of the application for Conditional Use Authorization under Planning Department Case Number 2020-001610CUA-02 pursuant to Planning Code Sections 209.31, 253, and 303 (Conditional Use Authorization), and pursuant to Planning Code Section 206.6 as an Individually-Requested State Density Bonus.

This memorandum addresses the appeal to the Board, filed on May 19, 2023, by the adjacent neighbor, Athanassios Diacakis.

The decision before the Board is whether to uphold, overturn, or amend the Planning Commission’s approval of an application for Conditional Use Authorization to allow the proposed Project at the subject property.

PROJECT DESCRIPTION

The Project includes demolition of an existing 25-foot-tall, two-story, single-family residence and new construction of a six-story, 60-foot tall, 11,147 gross square foot residential building with 19 group housing units, a 390-square-foot communal space, 19 Class 1 bicycle parking spaces, and two Class 2 bicycle parking spaces. The Project includes 890 square feet of common open space via a ground floor courtyard and two separate private roof decks at the sixth floor, including a 149 square foot front deck and a 165 square foot rear deck. The building’s rooftop stair and mechanical penthouses would add an additional eight feet of height above the roof, and the elevator shaft will rise six feet above the roof, these features are centrally

located toward the middle of the roof plan. The Project provides no automotive parking and would remove an existing curb cut.

SITE DESCRIPTION & PRESENT USE

The Project site is located midblock on the north side of 18th Street, between Dolores and Sanchez Streets; Lot 018 in Assessor's Block 3580 and is located within the RM-1 (Residential-Mixed, Low Density) Zoning District and a 40-X Height and Bulk District. The Project site is a relatively flat lot with an area of approximately 3,868 square feet, frontage of 27 feet, 6 inches on 18th Street, and an average depth of approximately 141 feet, 10 inches. The site is currently developed with an existing 1,210 square foot, two-bedroom, one-story-over-garage, single-family dwelling constructed circa 1900.

SURROUNDING PROPERTIES AND NEIGHBORHOOD

The subject property is located on the southeast side of the Castro/Upper Market Neighborhood within Supervisorial District 8. The surrounding properties are located in the RM-1, RH-3, RM-3, and Public (P) Zoning Districts and are developed with a variety of residential, institutional and mixed-use buildings ranging in height from one to five stories. Ground floor commercial uses are generally provided at the street corners and the block includes a range of residential uses ranging from single family homes to multi-unit apartment building. The adjacent property to the east (3826, 3828, 3830a 18th St) is developed with a three-story-with-attic two-unit building at the front and a one-story-with-attic dwelling unit/cottage located at the rear of the property. The adjacent property to the west (3838 18th St) contains a two-story two-family dwelling. One lot further to the west contains the Mission Terrace Senior Housing site, a 5-story, 107 apartment development that extends through the block to Dorland Street. Across from the Project site, on the south side of 18th Street, lots are within RH-3 and 40-X Districts and developed with 3 and 4-story multi-family dwellings. Mission High School and Mission Dolores Park are located one block directly east along 18th Street. There is a J-Church MUNI stop platform near the corner of 18th Street and Church Street which runs along the western edge of Mission Dolores Park and Mission High School.

BACKGROUND

- On July 30, 2020, the Project Sponsor filed the Application with the Planning Department (hereinafter "Department").
- On July 15, 2021, the Commission conducted a duly noticed public hearing at a regularly scheduled meeting on Conditional Use Authorization Application No. 2020-001610CUA and after public comment and discussion, continued the item to October 14, 2021, and provided feedback on the design of the proposal with recommendations on possible changes, including the removal of a floor to reduce the height of the building. The item was continued to allow the sponsor time to develop and incorporate design changes.
- On October 14, 2021, the Commission conducted a duly noticed public hearing at a regularly scheduled meeting on case No. 2020-001610CUA. In the interest of fulfilling the intent of the

Commission's request to study an alternative design scheme that reduced the massing by a floor, the Department prepared a design alternative for a building that implemented the Commission's suggested design improvements for the Project. The alternate design addressed the intent of the Commission's comments through the removal of the sixth floor, including the two penthouse units, stairs and elevator and roof decks, and the relocation of the two units to ground level at the rear. The Department recommended approval of the Proposed Project but presented to the Commission the design alternatives intended to address their requests for a massing reduction.

- At the October 14, 2021 hearing, the Planning Commission discussed the Department's design alternative and made a Motion to Approve a 19-room group housing project at 3832 18th Street, and conditioned on the reduction in the height of the building from six to five stories. The removal of the sixth story would require the removal of the community kitchen on the ground floor. The project, a State Density Bonus project, had requested three waivers from Planning Code requirements for height, rear yard, and exposure. The approved project, even with the reduction in height, still required all three waivers. On November 21, 2021, the property owners within close vicinity of the project appealed the Commission's approval to the Board of Supervisors, who upheld the Planning Commission's decision on March 15, 2022.
- On December 22, 2022, the Planning Department received a Notice of Violation from the California Department of Housing and Community Development (HCD) stating the City denied the height waiver by conditioning the project at five stories, and not allowing six stories. (See attached NOV.) Under State Density Bonus law, waivers can only be denied if the waiver has an adverse impact on health and safety that cannot be mitigated or avoided; the waiver has an adverse impact on a property in the California Register of Historic Properties; or if approving the waiver would be contrary to on state or federal law. HCD also stated that once a project qualifies for a density bonus, the SDBL does not authorize a local agency to deny a proposed waiver, including by way of a required re-design, even if the project could be re-designed to accommodate the same number of units without requested project amenities. HCD cited three cases, Bankers Hill 150 v. City of San Diego (2022) 74 Cal.App.5th 755, Wollmer v. City of Berkeley (2011) 193 Cal.App.4th 1329 and Schreiber v. City of Los Angeles (2021) 69 Cal.App.5th 549.
- On April 20, 2023, the Planning Commission conducted a duly noticed public hearing at a regularly scheduled meeting on Conditional Use Authorization Application No. 2020-001610CUA-02 and heard the six-story project, and after public comment and discussion approved the project with conditions.

CONDITIONAL USE AUTHORIZATION REQUIREMENTS

Planning Code Section 303 establishes criteria for the Commission to consider when reviewing all applications for Conditional Use approval. To approve the project, the Commission must find that these criteria have been met:

1. That the proposed use or feature, at the size and intensity contemplated and at the proposed location, will provide a development that is necessary or desirable for, and compatible with, the neighborhood or the community; and

2. That such use or feature as proposed will not be detrimental to the health, safety, convenience or general welfare of persons residing or working in the vicinity, or injurious to property, improvements or potential development in the vicinity, with respect to aspects including but not limited to the following:
 - a. The nature of the proposed site, including its size and shape, and the proposed size, shape and arrangement of structures;
 - b. The accessibility and traffic patterns for persons and vehicles, the type and volume of such traffic, and the adequacy of proposed off-street parking and loading;
 - c. The safeguards afforded to prevent noxious or offensive emissions such as noise, glare, dust and odor;
 - d. Treatment given, as appropriate, to such aspects as landscaping, screening, open spaces, parking and loading areas, service areas, lighting and signs; and
3. That such use or feature as proposed will comply with the applicable provisions of this Code and will not adversely affect the General Plan.
4. That such use or feature as proposed will provide development that is in conformity with the stated purpose of the applicable Use District.

Pursuant to Planning Code Section 206.6(e), the Planning Commission shall make the following findings as applicable for any application for a Density Bonus, Incentive, Concession or Waiver for any Individually Requested Density Bonus Project:

1. The Housing Project is eligible for the Individually Requested Density Bonus Program;
2. The Housing Project has demonstrated that any Concessions or Incentives reduce actual housing costs, as defined in Section 50052.5 of the California Health and Safety Code, or for rents for the targeted units, based upon the financial analysis and documentation provided;
3. If a waiver or modification is requested, a finding that the Development Standards for which the waiver is requested would have the effect of physically precluding the construction of the Housing Project with the Density Bonus or Concessions and Incentives permitted;
4. If the Density Bonus is based all or in part on donation of land, a finding that all the requirements included in Government Code Section 65915(g) have been met;
5. If the Density Bonus, Concession or Incentive is based all or in part on the inclusion of a Child Care Facility, a finding that all the requirements included in Government Code Section 65915(h) have been met; and
6. If the Concession or Incentive includes mixed-use development, a finding that all the requirements included in Government Code Section 65915(k) have been met.

APPELLANT ISSUES AND PLANNING DEPARTMENT RESPONSES

ISSUE 1: The Project's design and implementation do not meet the necessary criteria or definition for group housing per the Planning Code and therefore does not qualify for the State Density Bonus as approved by the Planning Commission.

ISSUE 4: The Project is not code compliant (does not meet group housing definition) and therefore does not qualify for the State Density Bonus as approved by the Planning Commission.

RESPONSES 1 & 4: The Project was conditionally approved as a 19-room group housing project by the Planning Commission at the October 14, 2021 hearing, in compliance with the Planning Code's definition of Group Housing applicable to the Project.

The Project was conditionally approved as a 19-room group housing project by the Planning Commission at the October 14, 2021 hearing, and upheld by the Board of Supervisors on March 14, 2022. The Project provides 19 bedrooms each with an in-unit bathroom, laundry and kitchenette, consistent with relevant Planning Code requirements and Zoning Administrator interpretation regarding limited kitchen facilities. At the time of the Project's approval, Group Housing, per Planning Code Section 102, was defined as a residential use that provides lodging or both meals and lodging, without individual facilities (full kitchens). Pursuant to a Zoning Administrator interpretation of 209.2(a), effective October 2005, Group Housing "was allowed to have limited kitchen facilities with the following specifications: a small counter space, a small under-counter refrigerator, a small sink, a microwave, and a small two-ring burner. Such limited kitchen facility shall not include any other type of oven, as that would constitute a full kitchen." The Project is consistent with the definition per Zoning Administrator's interpretation and provides a 390 square foot communal room with a kitchen facility. The Commission's approval on April 20, 2023 modified the existing conditional use authorization application by reverting back to the original proposal to allow for the sixth floor of the proposed building. No changes were proposed to the approved residential group housing use or density. The Project is a Code-complying. On April 30, 2022, changes to the group housing definition became effective per Board File 211299 and Ordinance Number 50-22. The revised definition is not applicable to this project since the Project Sponsor filed a Preliminary Application subject to SB-330 on July 28, 2020.

ISSUE 2: The project is incompatible with the neighborhood or community and may negatively affect the health, safety, convenience, and general welfare of the neighbors.

RESPONSE 2: The Project provides a Code compliant group housing State Density Bonus Project with on-site below market rate units within a building that is compatible with the character of the neighborhood and the Department's Residential Design Guidelines, in the context of State Density Bonus Law.

The size of the approved Project, a six-story building, is in keeping with other residential properties in the neighborhood. Further, at 60 feet the proposed height is within the allowable height range available through the State Density Bonus Program. In their review, the Commission discussed the appropriateness of the project's proposed height.

Additionally, the building provides a front setback that is equal to the depths of the two adjacent neighbors. This area will be appropriately developed with landscaping and permeable surfaces. In addition to two common entrances at the front, the project includes direct access from the street to one of the rooms, consistent with the existing residential development on the block. The Project provides a rear building wall at a location the results in a rear yard equal to 25% of the lot's depth. This provides a rear yard that contains

enough area for code-complaint common open space for the 19 rooms. Along the side property lines, the project proposes four lightwells, two on each side of the building; all are three feet deep and range in length from 17 feet to 36 feet. These lightwells provide additional light and air to each neighboring property. The Project results in a building size, shape, and height that is appropriate for the neighborhood context. Overall, the project's design is complementary to the context of the district, while providing a new housing type to the neighborhood; therefore, the Commission found the Project's proposed massing and siting is generally consistent with the character and design elements of the neighborhood, in the context of State Density Bonus Law, which requires the approval of additional density, concessions and incentives, and waivers for eligible projects.

ISSUE 3: The project does not comply with the General Plan, specifically in relation to the preservation of family-sized housing units, and that it undermines the existing housing and neighborhood character.

RESPONSE 3: On balance, the Project is consistent with the Objectives and Policies of the General Plan, in the context of the State Density Bonus Law.

When making General Plan Consistency the Planning Commission must often balance competing policies and come to a decision as to whether or not the proposed project is, on balance, consistent with the General Plan. In this case, the Commission found that, on balance, the Project was consistent with the General Plan. In addition, the Commission also found that the resulting Project would help alleviate San Francisco's severe housing crisis and provide housing within a well-resourced transit rich neighborhood. Additionally, 20% of the proposed Group Housing rooms (or three rooms) will be on-site inclusionary. While the Project may not provide housing opportunities explicitly for families, 19-bedroom group housing project would replace an existing two-bedroom single-family home, resulting in a net increase of 17 bedrooms to the housing stock of the City, which is consistent with Objectives and Policies of the General Plan.

The size of the proposed six-story 19-bedroom group housing project is in keeping with other residential properties in the neighborhood. The proposed height of 60 feet is an allowable height when using the State Density Bonus Program. The property is designed appropriately to minimize light and privacy impacts to surrounding properties and the mid-block open space. The building's rear yard is equal to the depth of the two adjacent properties. Additionally, the building's side property line is set back on the 2nd to 6th floors to allow southerly and northerly adjacent properties to maintain light and air.

The Project is consistent with the stated purpose of the RM-1 Zoning District, which is characterized by a mixture of the dwelling types found in Residential Districts. In addition, this district also has a significant number of apartment buildings that broaden the range of unit sizes and the variety of structures. The Project maintains the pattern of 25-foot to 27.5-foot building widths, and a height of five-stories at the building's front facade. The overall density of units remains low at a per bedroom basis and is consistent with the surrounding properties. Overall, the Project's design is complementary to the context of the district, while providing a new housing type to the neighborhood. For all these reasons, the Project is on balance, consistent with the Objectives and Policies of the General Plan and the Commission found the project to be necessary and desirable, in the context of State Density Bonus Law.

SUMMARY RESPONSE

The appellants contend that the Planning Commission's approval of the Project was incorrect, and that the project is not compliant with the required Findings for Conditional Use Authorization or with the Objectives and Policies General Plan. On these issues, the Planning Commission found that the Project is, on balance, consistent with the Objectives and Policies of the General Plan. The Commission found that resulting project would provide 19 Group Housing rooms helping alleviate San Francisco's severe housing crisis and provide housing within a transit rich neighborhood. Additionally, 20% of the proposed Group Housing rooms (or three rooms) will be on-site affordable units and is therefore necessary and desirable project in the context of the State Density Bonus Law.

CONCLUSION

For the reasons stated in this document, in the attached Resolution, and in the Planning Department case file, the Planning Department recommends that the Board uphold the Planning Commission's decision in approving the Conditional Use authorization for the Project.

ATTACHMENTS

Department of Housing and Community Development (HCD) Letters

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

2020 W. El Camino Avenue, Suite 500
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December 29, 2022

Kate Conner, LEED AP
Manager Priority Projects and Process
Current Planning Division
City and County of San Francisco
49 South Van Ness Avenue, Suite 1400
San Francisco, CA 94103

Dear Kate Conner:

RE: 3832 18th Street Project – Notice of Violation

This letter serves as a follow-up to the recent communication between the California Department of Housing and Community Development (HCD) and the City/County of San Francisco (City/County) regarding the conditional approval of a 19-unit group housing project located at 3832 18th Street (Project).

Background

In proposing the Project, the project sponsor invoked State Density Bonus Law (SDBL) to allow additional group housing units above the base density, utilize waivers from specific development standards to facilitate construction of the project, and provide on-site affordable housing as set forth under the SDBL. At a public hearing on October 14, 2021, the Planning Commission approved the Project but included a condition that the project sponsor “shall provide a building design that is consistent with Planning’s recommended alternative design of a project that is five (5) stories in height.”¹ This condition was imposed despite the project sponsor’s legitimate SDBL waiver request to waive the 40-foot height standard and provide a building height of six stories to accommodate the Project’s 19 group housing units. At an appeal hearing on March 15, 2022, the Board of Supervisors upheld the Planning Commission’s project approval as conditioned with the five-story “alternative design.”

¹ October 14, 2021, San Francisco Planning Commission Motion No. 21016, Condition #13 regarding Project Modifications.

On August 11, 2022, HCD sent a Letter of Inquiry (enclosed) to the City/County identifying HCD's concern that the conditional approval conflicts with the SDBL, specifically Government Code section 65915, subdivision (e)(1), pertaining to waivers from development standards proposed by SDBL project sponsors. In the letter, HCD provided statutory interpretation supported by discussion of relevant, settled case law, and requested that the City/County elaborate on the Planning Commission's decision by providing written findings that reconcile how the required re-design of the project (specifically, the reduction in height) was legally consistent with the above-referenced SDBL provisions.

On October 13, 2022, HCD received a response letter from the City/County, which included a copy of the Planning Commission's approval motion and findings for approval. While HCD appreciates the City/County's response, it failed to address the request to provide findings consistent with the above-described legal justification. Absent a sufficient legal justification, HCD finds that in failing to grant the project sponsor's waiver request, the City/County violated the SDBL provisions set forth under Government Code section 65915, subdivision (e)(1).

Failure to Grant the Requested Waiver Violates the State Density Bonus Law

As detailed in HCD's previous letter, under the SDBL, a local agency is not permitted to apply any development standard that physically precludes the construction of a qualifying density bonus project at its permitted density, and with the granted concessions/incentives, where applicable. (Gov. Code, § 65915, subd. (e).)² Once a project qualifies for a density bonus, "the law provides a developer with broad discretion to design projects with additional amenities even if doing so would conflict with local development standards." *Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App 5th 755, 774-75 [289 Cal.Rptr.3d 268, 282]. Similarly, once a project qualifies for a density bonus, the SDBL does not authorize a local agency to deny a proposed waiver, including by way of a required re-design, based on the idea that the project conceivably could be redesigned to accommodate the same number of units without amenities. *Wollmer v. City of Berkeley* (2011)193 Cal.App.4th 1329, 1346-47 [122 Cal.Rptr.3d 781, 793].

As previously noted, a local agency may refuse a proposed waiver or reduction of development standards only "if the waiver or reduction would have a specific, adverse impact . . . upon health, safety, or the physical environment," would have "an adverse impact" on an historic resource, or "would be contrary to state or federal law." (Gov. Code, § 65915, subd. (e)(1).) In this context, 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." (Gov. Code, § 65915, subd. (e)(1).)

² See also *Schreiber v. City of Los Angeles* (2021) 69 Cal.App.5th 549, 556 [284 Cal.Rptr.3d 587, 593].

HCD again emphasizes that the manner in which the City/County conditionally approved the Project directly conflicts with this settled SDBL interpretation. Specifically, the Planning Commission imposed a condition of approval requiring the project sponsor to re-design the building to a height of five stories, instead of the proposed six stories, based on the idea that such a re-design could accommodate the same number of units by making modifications elsewhere to the project design (i.e., by significantly reducing and eliminating proposed on-site amenities and relocating sixth floor units to the ground floor). The approval motion did not include the SDBL health and safety findings referenced above, which would have been required to legally substantiate the effective denial of the requested waiver. Accordingly, the City/County violated the SDBL pursuant to Government Code section 65915, subdivision (e)(1).

Conclusion and Next Steps

Under Government Code section 65585, subdivision (i), HCD must give the City/County a reasonable time, no longer than 30 days, to respond to these findings. HCD provides the City/County until January 28, 2023, to provide a written response to these findings. In its response, the City/County should include, at a minimum, a specific plan and timeline for corrective action that allows the Project to move forward with the design and waiver proposed by the project sponsor without further delay or demonstrate that legally sufficient health and safety findings were made pursuant to Government Code section 65915, subdivision (e)(1). Failure to do so may result in further actions.

If you have questions or would like to discuss the contents of this letter, please contact Lisa Frank at Lisa.Frank@hcd.ca.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Zisser', with a long horizontal stroke extending to the right.

David Zisser
Assistant Deputy Director
Local Government Relations and Accountability

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
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August 11, 2022

Kate Conner, LEED AP
Manager Priority Projects and Process
Current Planning Division
City and County of San Francisco
49 South Van Ness Avenue, Suite 1400
San Francisco, CA 94103

Dear Kate Conner:

RE: City and County of San Francisco – Letter of Inquiry

The purpose of this letter is to seek information on a housing project which is located at 3832 18th Street (Project) and to provide technical assistance to the City and County of San Francisco (City/County) regarding the application of State Density Bonus Law (SDBL). The California Department of Housing and Community Development (HCD) has become aware of the conditional approval of the Project and is concerned that the City/County's actions may run counter to the statutory provisions of SDBL.

Project Description

HCD understands the proposed Project is a six-story, 19-unit group housing development including three low-income units to achieve a 35-percent density bonus above the base density of 14 group housing units. The project applicant requested waivers from three development standards: height, rear-yard setback, and dwelling unit exposure. HCD understands the Project was determined to be exempt from California Environmental Quality Act (CEQA) review on May 24, 2021. HCD further understands the Planning Commission had scheduled the Project for hearing on July 15, 2021, but continued the item until October 14, 2021. At the October hearing, the Planning Commission granted a conditional use authorization (CUA) to the Project, which granted up to five stories in height, exceeding the existing 40-foot height limit, but below the 60-foot height requested by the Project sponsor as a waiver under SDBL. Finally, HCD understands the Board of Supervisors upheld the approval of the CUA during an appeal hearing conducted on March 15, 2022.

Analysis

Development standard waivers (Gov. Code, § 65915, subd. (e)) can be used by an applicant to achieve either the number of units allowed by the base density (i.e., no density bonus requested) or the number of units allowed via a density bonus. The SDBL provides the following:

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) at the densities or with the concessions or incentives permitted by this section. (Gov. Code, § 65915, subd. (e)(1).)

Under the SDBL, a project is entitled to an unlimited number of waivers from development standards. Specifically, the City/County is not permitted to apply any development standard that physically precludes the construction of the Project at its permitted density and with the granted concessions/incentives. (Gov. Code, § 65915, subd. (e).)¹

Under SDBL:

- The applicant may propose to have such standards waived or reduced. (Gov. Code, § 65915, subd. (e).)
- The City may require the applicant to provide reasonable documentation to establish eligibility for the waiver. (Gov. Code, § 65915, subd. (a)(2).)
- The City may deny waivers only under limited conditions. (Gov. Code, § 65915, subd. (e)(1).)²

Once a project qualifies for a density bonus, “the law provides a developer with broad discretion to design projects with additional amenities even if doing so would conflict with local development standards.” *Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App 5th 755, 774-75 [289 Cal.Rptr.3d 268, 282]. A local agency may refuse the waiver or reduction only “if the waiver or reduction would have a specific, adverse impact . . . upon health, safety, or the physical environment,” would have “an adverse impact” on an historic resource, or “would be contrary to state or federal law.” (Gov. Code, § 65915, subd. (e)(1).) In this context, 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.” (Gov. Code, §§ 65915, subd. (e)(1), and 65589.5, subd. (d)(2).)

¹ See also *Schreiber v. City of Los Angeles* (2021) 69 Cal.App.5th 549, 556 [284 Cal.Rptr.3d 587, 593].

² Waivers may be denied only if the project has an adverse impact on health and safety that cannot be mitigated or avoided, the project has an adverse impact on a property in the California Register of Historic Properties, or approving the waiver would be contrary to State or Federal law. (Gov. Code, § 65915, subd. (e)(1).)

This provision does not authorize the City/County to condition a project based on the theory that another project with a similar number of units without amenities might conceivably be designed differently and accommodated without waivers. *Wollmer v. City of Berkeley* (2011)193 Cal.App.4th 1329, 1346-47 [122 Cal.Rptr.3d 781, 793].³ The courts have made it clear that if a project qualifies under SDBL, and if waivers are needed to physically allow that project to go forward with the incentives and concessions granted, the waivers must be granted. The City/County may not deny a waiver based on the possibility that the project could be redesigned without amenities.

Thus, qualified SDBL project applicants need not consider various alternatives that might be plausible on the site without waivers. Accordingly, the City/County must waive the development standards requested pursuant to Government Code section 65915, subdivision (e). *Wollmer*, supra, 193 Cal.App.4th at pp. 1346-47 [122 Cal.Rptr.3d 781]. The only exception is where a local jurisdiction can make findings about specific adverse impacts, as noted above.

In conditionally approving the Project, the Planning Commission granted it up to five stories in height. However, the Project applicant requested a waiver of the site's 40-foot height limit and proposed a height of 60 feet to accommodate the Project's six stories. The redesigned Project would remove community amenity spaces and bicycle parking and relocate two units from the sixth floor to the ground floor. HCD is concerned that this action would not grant the Project the requested height restriction waiver to which it is entitled, potentially constituting an effective denial of a waiver under SDBL by conditioning the Project to remove the sixth floor and limiting the overall height to less than 50 feet.

For this reason, HCD requests that the City/County provide the written findings to HCD reconciling the approval of the CUA and SDBL provisions under Government Code Section 65915, subdivision (e), within 30 days (by September 11, 2022), explaining the legal justification and the evidence behind these decisions.

Conclusion

As stated above, HCD is concerned that the Project has been improperly conditioned under SDBL. The State of California is in a housing crisis, and the provision of housing is a priority of the highest order. HCD has enforcement authority over SDBL (Gov. Code, § 65585). HCD encourages the City/County to reevaluate the CUA approved by the Planning Commission, and approve the Project as originally proposed by the Project applicant. In conditionally approving this project, the Planning Commission potentially

³ See also *Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App 5th 755 [289 Cal.Rptr.3d 268].

failed to make required findings under SDBL to deny a waiver that was originally requested by a project applicant. HCD encourages the City/County to remain mindful of its obligations under the SDBL.

If you have questions or need additional information, please contact Kevin Hefner at Kevin.Hefner@hcd.ca.gov

Sincerely,

A handwritten signature in black ink that reads "Shannan West". The signature is written in a cursive, flowing style.

Shannan West
Housing Accountability Unit Chief