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June 16, 2023

VIA E-MAIL

President Aaron Peskin and Supervisors
San Francisco Board of Supervisors
1 Dr. Carlton B. Goodlett Place
San Francisco, CA 94102

Re: 3832 18th Street (2020-001610CUA)
Conditional Use Authorization Appeal (Board File No. 230634)

Dear President Peskin and Supervisors:

Our office represents MJ Mission Dolores, LLC, owner of 3832 18th Street, as well as the nonprofit Yes In My Back Yard Law (YIMBY Law) and Sonja Trauss in her individual capacity. MJ Mission Dolores applied in 2020 for a conditional use authorization (CUA) to construct a 19-unit six-story group housing project at 3832 18th Street. The project provides three Below Market Rate (BMR) units that will be sold at an affordable rate to low-income individuals, which entitles the Project to a 35% density bonus and a waiver of development standards pursuant to the state Density Bonus Law (DBL), codified at Gov. Code § 65915.

The applicant requested a waiver from the site's 40-foot height limit and proposed a height of 60 feet to accommodate the project. On October 14, 2022, the Planning Commission approved the CUA with a condition to eliminate the sixth floor. The Planning Commission did not impose the condition to mitigate any identified public health and safety impacts, but rather it was described as a "design improvement." The Planning Commission's actions clearly violated the DBL.

On December 29, 2022, the California Department of Housing and Community Development ("HCD") issued a Notice of Violation against the City for imposing the condition to remove the proposed sixth story, and HCD directed the City to take corrective action. (See **Exhibit A**.) Planning Code § 303(f) provides the Planning Commission with the ability to modify CUAs when the Commission determines that a CUA was issued in violation of law. Pursuant to § 303(f), on April 20, 2023, the Planning Commission rescinded the unlawful condition and restored the sixth floor of the project as originally proposed. The project that was approved is identical to the project that was previously before the Commission on October 14, 2022.

Athanassios Diacakis, a neighbor who lives next door to the project, has repeatedly appealed the project. He appealed the Planning Commission's first approval, arguing that the project would impact neighbors' light and air. (Board File No. 211187). He appealed a street tree removal permit, arguing that an avocado tree that the Bureau of Urban Forestry labeled the "wrong tree in the wrong place" was a historical tree that was significant to the community. Mr. Diacakis

continues his harassment of the project and has now appealed the Planning Commission's action that was taken to correct the City's violation of state law.

The project meets or exceeds all objective Planning Code standards, or qualifies for a waiver from such standards under the state DBL. Therefore, the City is required by law to deny this appeal and approve the project. Moreover, Gov. Code § 65905.5(a) prohibits the City from conducting more than five hearings "in connection with the approval of that housing development project," and the City has already held more than five public hearings in connection with this housing development project. Thus, holding additional hearings violates the five-hearing limit, and this appeal should be rejected in its entirety.

The Project is Entitled to Density Bonus and Development-Standard Waivers

Pursuant to the state DBL, a housing development that provides a certain percentage of the project's units as affordable housing is entitled to a waiver of any development standards that preclude the construction of the project at the density proposed. Gov. Code § 65915(e) states that an agency may not refuse to grant a developer's proposal for a waiver from a development standard that will have the effect of physically precluding the construction of the project unless the waiver would have a specific, adverse impact on public health and safety. A waiver may not be denied based on the theory that another project with a similar number of units might conceivably be designed and accommodated without waivers. (*See Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1346-1347; *see also Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755, 775.)

The project provides three Below Market Rate (BMR) units that must be sold at an affordable rate to low-income individuals, which entitles the project to a 35% density bonus and a waiver of development standards pursuant to the DBL. The applicant requested a waiver from the site's 40-foot height limit and proposed a height of 60 feet to accommodate the project. The Planning Commission's original condition eliminated the common room and group kitchen facilities, greatly reduced the available bike storage on a site without parking, effectively eliminated at least one unit, removed all private open space, caused multiple Building Code compliance issues, and destroyed the financial feasibility of the project. The Planning Commission did not impose the condition to mitigate any identified public health and safety impacts, but rather described it as a "design improvement." The Planning Commission's condition clearly violated the DBL, as confirmed by HCD in its Notice of Violation. (See **Exhibit A**.)

The Appellant asserts, without evidence or explanation, that the project "may" negatively affect the health and safety of neighbors. The appeal does not identify how the project would affect public health and safety, nor does the appeal even identify any objective, identified written public health or safety standards that the project fails to meet. This is unsurprising because the project will not cause any health and safety impacts. The Appellant's bare assertion to the contrary is without merit.

The Project is Code-Compliant as a Matter of Law

The HAA also imposes strict timelines for local agencies to determine whether a proposed housing development project is inconsistent, not in compliance, or not in conformity with any

applicable objective plan, program, policy, ordinance, standard, or other requirement. Gov. Code § 65589.5(j)(2)(A)(i) states that a local agency must provide written documentation identifying and explaining any code noncompliance "[w]ithin 30 days of the date that the application for the housing development project is determined to be complete, if the housing development project contains 150 or fewer housing units." Gov. Code § 65589.5(j)(2)(B) further states that if an agency fails to provide the required written code noncompliance documentation within the specified timeframe, "the housing development project shall be deemed consistent, compliant, and in conformity with the applicable plan, program, policy, ordinance, standard, requirement, or other similar provision."

Here, the application was submitted on July 15, 2020, and the application was determined to be complete by the City on August 9, 2020. The project contains fewer than 150 units, and thus Gov. Code § 65589.5(j)(2) required the City to provide written documentation identifying and explaining any noncompliance with applicable ordinances, policies, or standards within 30 days of the date the application was determined to be complete (i.e., by September 8, 2020). The City failed to provide any written noncompliance documentation within that timeframe, and thus as a matter of law, the project was deemed code-compliant on September 9, 2020.

Because the project has been deemed code-compliant as a matter of law, the City would be obligated by Gov. Code § 65589.5(j)(1) to approve the project at the proposed density unless the City provided substantial evidence to establish that the proposed project will have a specific, adverse impact upon public health or safety. (*See Cal. Renters Legal Advocacy and Educ. Fund v. City of San Mateo* (2021) 68 Cal. App. 5th 820) In this case, the City has not identified any specific, adverse impacts to public health and safety that would be caused by the project, nor could it, and thus the project must be approved at the density proposed.

The Project Has Been Deemed Approved as a Matter of Law

The Permit Streamlining Act ("PSA") requires agencies to take a final action within a specific timeframe, depending on the level of environmental review. For projects that have been determined to be exempt from the California Environmental Quality Act ("CEQA"), the PSA requires final action on the project within 60 days after the exemption determination. (Gov. Code § 65950(a)(5).)

Here, the City determined that the project was exempt from CEQA on May 24, 2021, but failed to act on the project within sixty days (i.e., by July 23, 2021) as required by the PSA. The City provided public notice regarding the project as required by the City's Planning Code prior to the July 15 Planning Commission hearing but failed to act on the project until October 14. Thus, both the "failure to act" and "public notice" prerequisites for the project to be deemed approved pursuant to the PSA have been satisfied, and the project has been deemed approved as a matter of law. (*See Linovitz Capo Shores LLC v. Cal. Coastal Comm'n* (2021) 65 Cal. App. 5th 1106, 1122-24; *see also Am. Tower Corp. v. City of San Diego* (9th Cir. 2014) 763 F.3d 1035, 1048.)

Courts have also confirmed that the public notice does not need to include a statement that the project would be deemed approved for a failure to act because while "providing information about potential scenarios that could occur . . . including potential deemed approval under the Streamlining Act, might be informative, it is unnecessary to safeguard a person's property

interests." (*Linovitz*, supra, 65 Cal.App.5th at 1124.) The notice that was provided prior to the July 15 Planning Commission hearing satisfied the public notice requirement, regardless of whether it contained an explicit statement regarding the PSA deadline. Thus, this project has already been deemed approved as a matter of law regardless of the outcome of this appeal.

Five-Hearing Limitation

When a housing development project complies with applicable, objective general plan and zoning standards, Gov. Code § 65905.5(a) prohibits the City from conducting more than five hearings "in connection with the approval of that housing development project." The term "hearing" is defined as "any public hearing, workshop, or similar meeting, including any appeal, conducted by the city or county with respect to the housing development project," Gov. Code § 65905.5 makes clear that the five-hearing limitation applies to a hearing held in connection with the entirety of a *project*, not to a project *application*.

The City has *already* held more than five public hearings in connection with the housing development project, including three Planning Commission hearings (July 15, 2021, October 14, 2021, April 20, 2023), four Board of Supervisors hearings (December 7, 2021; January 11, 2021; February 8, 2022; and March 15, 2022), and two tree-removal hearings (December 7, 2022 and February 22, 2023). Thus, the City is prohibited from holding any additional hearings regarding this project. This appeal should be rejected in its entirety so the project can move forward forthwith.

The Planning Commission's Conditional Use Abatement Action Does Not Constitute a "New Application"

Planning Code § 303(f) provides the Planning Commission with the authority to abate CUAs issued in violation of the law by revoking or modifying prior CUA approvals. Planning Code § 303(f)(1) states that the Planning Director may schedule an abatement hearing at any time after receiving substantial evidence that a violation of law has occurred.

As explained above, the Planning Commission's conditioned approval violated the DBL, and the HCD directed the City to correct this violation. HCD's Notice of Violation and the facts therein constitute substantial evidence that the conditional approval of the CUA was in violation of state law, and that the City was required to remove this unlawful condition to correct the violation. On February 22, 2023, the Project Sponsor demanded that the City correct the violation by modifying the conditions pursuant to the CUA abatement procedures in Planning Code § 303(f). The project sponsor did not submit a new application, pay any application fees, or propose any changes to the project as originally proposed.

The Appellant argues that the Project Sponsor submitted a rehearing request pursuant to Planning Code § 306.5. Not only is this factually inaccurate, as the Project Sponsor clearly demanded the Planning Commission unilaterally use its authority to abate violations of law pursuant to § 303(f), but § 306.5 does not provide a CUA "Rehearing Request" procedure at all. Rather, § 306.5 *prohibits* an applicant from submitting a CUA application within one year following the disapproval of the same project. Again, the Project Sponsor did not submit a new application. The Project Sponsor demanded that the City correct a violation of law pursuant to the Planning Code's abatement procedures.

The Appellant also argues that because the Project Sponsor did not sue the City to correct the violation of law, the prior CUA approval was "final" and cannot be modified without a new application. The Appellant again ignores the plain language of the Planning Code's abatement procedures, which the Planning Commission followed in this case. Planning Code § 303(f)(1) clearly authorizes the Planning Commission to take a CUA abatement action to correct a violation of law "***at any time while the Conditional Use authorization is effective***." Regardless of whether the prior unlawful conditional approval was "final," § 303(f)(1) allows violations of law to be corrected at any time a CUA is effective. The prior CUA here was still effective at the time the Planning Commission modified the CUA pursuant to § 303(f).

The Project is Not Subject to the New Definition of Group Housing

The Housing Crisis Act of 2019, also known as SB 330, strengthened protections for housing development projects under the HAA. SB 330 provides an applicant with the ability to submit a "preliminary application" for any housing development project. The primary benefit of a preliminary application is to "freeze" the current development standards and requires that a local government only subject a project to the ordinances, policies, and standards adopted and in effect when a preliminary application was submitted. (Gov. Code § 65589.5(o).)

Here, the Project Sponsor submitted a preliminary application on July 27, 2020. Thus, pursuant to SB 330, the project is only subject to the ordinances, policies, and standards adopted and in effect as of July 27, 2020. Any subsequent development standards are simply not applicable.

On March 31, 2022, the City amended the Planning Code definition of Group Housing. (See Ordinance 050-22.) The new definition requires group housing units to be rental units, prohibits limited cooking facilities within each unit, requires 0.5 square feet of common space for each square foot of private space, and requires 15% of common space to be devoted to community kitchens. This ordinance was enacted after the preliminary application for this project was submitted on July 27, 2020, and therefore Ordinance 050-22 is not applicable to the project.

The Appellant erroneously argues that that the project is not code-compliant because it does not comply with the new definition of Group Housing that was enacted. This argument is without merit for several reasons. First, as explained above, the project is deemed code-compliant as a matter of law due to the City's failure to identify any code inconsistencies within 30 days as required by the HAA. Second, Ordinance 050-22 was enacted after the preliminary application for this project was submitted on July 27, 2020, and therefore Ordinance 050-22 is not applicable to the project.

The Appellant argues that SB 330 does not apply because a new application was submitted in 2023, which of course is incorrect because the Project Sponsor never submitted a new application in 2023, but instead demanded the Planning Commission correct a violation of law pursuant to the CUA abatement procedures. Moreover, the preliminary application protections in SB 330 are not tied to one *application*, but instead freeze the development standards that are applicable to a *project*. SB 330's protections only lapse if the "housing development *project* is revised following submittal of a preliminary application pursuant to Section 65941.1 such that the number of residential units or square footage of construction changes by 20 percent or more."

Here, the number of units or square footage of the project has not changed at all following the submittal of a preliminary application, and therefore the project is only subject to the ordinances and standards in effect as of July 27, 2020. Ordinance 050-22 is not applicable to the project, and compliance or non-compliance with its provisions is irrelevant.

The Project Complies with the Applicable Group Housing Provisions

The Appellant also argues that that the project does not comply with the definition of group housing that was in effect at the time the preliminary application for this project was submitted. The Appellant identifies two purported "inconsistencies," stating that group housing units may not contain limited kitchen facilities or be individually owned. Again, the project is deemed code-compliant as a matter of law due to the City's failure to identify any code inconsistencies within 30 days after the application for the project was deemed complete, as required by the HAA. Moreover, both of the Appellant's contentions are incorrect.

First, the applicable Planning Code definition of group housing did not prohibit occupants from owning their units, nor require any specific form of occupancy at all. The group housing definition included a non-exhaustive list of various types of group housing arrangements, including residence clubs that traditionally allow groups of individuals to each purchase fractional ownership in a unit, and "communes," which is a broad category of cohousing arrangement that can operate as housing cooperatives or as more traditional homeowners associations where individuals own private units. The Appellant's statement that none of the group housing types allows ownership is simply false. In fact, Ordinance 050-22 amended the definition of group housing to prohibit ownership units, which simply confirms that the prior definition *did* allow for group housing units to be individually owned.

Second, the Appellant does not argue that the project is inconsistent with the 2005 Zoning Administrator (ZA) interpretation of the Planning Code's group housing definition, which allowed limited kitchen facilities within group housing units. Rather, the Appellant appears to challenge the 2005 ZA interpretation itself. The ZA's 2005 interpretation was issued pursuant to the ZA's authority under Planning Code § 307, which states that ZA interpretations are necessary to administer the Planning Code, "will be of general application in future cases," and "shall be made a part of the permanent public records of the Planning Department." In other words, ZA interpretations are binding precedent on future cases.

Moreover, all ZA interpretations are subject to appeal pursuant to Planning Code § 308. The Appellant did not appeal the ZA's 2005 interpretation, and the statute of limitations to challenge this interpretation has long expired. The City has consistently applied the 2005 ZA policy to multiple group housing projects, as required by Planning Code § 307. As explained above, the project submitted a preliminary application that "freezes" existing ordinances, policies, and standards adopted and in effect at the time the preliminary application was submitted. The ZA's 2005 interpretation qualifies as an adopted policy and standards, and the City is therefore prohibited from adopting a different standard to apply to this project.

Further, the 2005 ZA interpretation is also consistent with a more recent 2021 ZA interpretation of the definition of "Dwelling Unit." The definition of Dwelling Unit only allows for one kitchen. The 2021 ZA interpretation allows for Dwelling Units to contain a kitchen with a full-

size oven ***and*** additional limited cooking facilities including a range with two burners, counter sink, and refrigerator/freezer of any size, finding that such limited cooking facilities do not constitute a full kitchen. Similarly, the 2005 ZA interpretation also allowed limited cooking facilities within group housing units because such limited cooking facilities do not constitute a full kitchen, which is what differentiates a group housing unit from a dwelling unit. Contrary to the Appellant's assertion, the ZA interpretation is not contrary to the Planning Code, but is entirely consistent with the definition of the terms "kitchen," "cooking facilities," and "dwelling unit."

In short, the project has been deemed code-compliant as a matter of law and is, in fact, compliant with the Planning Code standards, or qualifies for a waiver from such standards under the state DBL. Thus, pursuant to the HAA, the City is obligated to approve the project unless the City provides substantial evidence to establish that the proposed project will have a specific, adverse impact upon public health or safety, which is not possible in this case.

Conclusion

The Planning Department and Planning Commission has already determined that the project as originally proposed meets the criteria for approval, and, therefore, approval is required by the HAA. In the event the City attempts to impose any additional conditions, we hereby request a concession or waiver of any such condition. We respectfully request that the project be approved forthwith as originally proposed to correct the City's prior imposition of unlawful conditions on the project.

Very truly yours,

PATTERSON & O'NEILL, PC

Ryan J. Patterson
Brian J. O'Neill

cc: Shannan West, Housing Accountability Unit Chief, HCD
Kevin Hefner, Team Manager, HCD

EXHIBIT A

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT
2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov

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,

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).)

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[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,

Shannan West
Housing Accountability Unit Chief