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May 26, 2023

Rucha Dande
Senior Planner
Planning Division
City of San Carlos
600 Elm Street
San Carlos, CA 94070

Re: PLN2023-0004: 11 El Camino Real – Development Application

Dear Ms. Dande:

On behalf of SummerHill Apartment Communities (“SummerHill” or “Applicant”), we submit this letter to accompany the resubmittal of the above-referenced project’s March 16, 2023 development application, which you deemed complete but not compliant with the Municipal Code in your April 14, 2023 correspondence. As with the initial development application, this resubmittal is subject to the Housing Accountability Act (Gov. Code § 65589.5), the State Density Bonus Law (Gov. Code § 65915), and the Housing Crisis Act of 2019 (Gov. Code § 66300). This statutory framework, which expressly preempts any conflicting local laws, sets forth strict criteria that a local agency must apply when considering a project for approval, as set forth below.

The purpose of this correspondence is to update my January 5, 2023 letter to reflect the project’s current status and modifications to the project’s incentive requests under the Density Bonus Law.

I. PROJECT VESTING

On March 16, 2023, Applicant submitted an SB 330 preliminary application pursuant to Government Code section 65941.1 to vest the City’s adoption of its updated General Plan and zoning ordinance, and submitted its full development application on the same date.

The preliminary application triggered the vesting provisions of Government Code section 65589.5(o), and the timely filing of the full development application established vested rights for the project throughout the entitlement process. The discussion below is essentially identical to the discussion set forth in my January 5 letter to you, although there are modifications to the incentive requests (Sec. II.A.2), and a deletion of the prior CC&R termination discussion (former Sec. III).

II. DENSITY BONUS LAW

The project qualifies under the Density Bonus Law (“DBL”) based on its inclusion of 15% below market rate units (10% very low income; 5% low income). This level of affordability yields a 32.5% density bonus and two incentives. (Gov. Code §§ 65915(d)(2)(B), 65915(f)(2).) Moreover, the project is entitled to an unlimited number of waivers or reductions to otherwise-applicable development standards that would physically preclude development of the project as proposed. (Gov. Code § 65915(e).)

A. Incentives

1. Legal Background

The definition of an “incentive” includes, but is not limited to, a reduction in site development standards or a modification of zoning code requirements, or other regulatory incentives proposed by the developer, that result in identifiable and actual cost reductions to provide for affordable housing costs. (Gov. Code § 65915(k).)

A local agency must grant the incentive request unless it can make a written finding, based on substantial evidence, that: (1) the incentive does not result in identifiable and actual cost reductions to provide for affordable housing costs; (2) the incentive would have a specific, adverse impact on the public health or safety, or upon an historical resource; or (3) would be contrary to state or federal law. (Gov. Code § 65915(d)(1).) We submit that none of those findings can be made with regard to this project.

Recent case law confirms that an applicant is not required to establish that the requested incentive will result in cost reductions. In *Schreiber v. City of Los Angeles* (2021) 69 Cal.App.5th 549, 555, the court explained that there is a presumption that an incentive will result in cost reductions and that an applicant “is not required to establish that cost reductions will result.” Instead, a city must approve the incentive request unless it makes one of the written findings set forth in Section 65915(d)(1). (*Ibid.*) “By requiring the city to grant incentives unless it makes particular findings, the statute places the burden of proof on the city to overcome the presumption that incentives will result in cost reductions.” (*Id.* at 556.) Because of this presumption, a city is “not required to make an affirmative finding that the incentives would result in cost reductions, or to cite evidence to establish a fact presumed to be true.” (*Id.* at 560.)

2. Project Incentive Requests

As noted above, the project is entitled to, and Applicant seeks, two incentives. Please note that the first incentive requested below could also qualify as a development standard waiver, and Applicant may recharacterize this incentive as a waiver request in the event that other incentives are necessary to proceed with the project. The second incentive requested below relates to modification to construction start time.

a. Policy NOI-1.5(d)

Applicant seeks relief from General Plan Policy NOI-1.5(d), which imposes dBA limits for intermittent noise level generated during train operations. The project as proposed will not fully comply with this development standard. The project will meet all Title 24 and other State or City noise requirements, as described in the Charles Salter and Associates report to be submitted following this letter. Relevant project components are addressed below:

- Applicant will provide high quality windows in the bedrooms of units throughout the project, which are rated to comply with Title 24 and other City noise requirements instead of those necessary to comply with this General Plan Policy. As a result, bedrooms throughout the project will not exceed an instantaneous noise (Lmax) level of 55 dB. This incentive will result in identifiable and actual cost reductions to provide for affordable housing costs. Providing the windows necessary to comply with Policy NOI-1.5(d) would increase the project's costs by approximately \$1.25 million for double windows (in which two individual windows are installed in a single window opening) and approximately \$1.5 million for commercial aluminum windows. These cost savings would help offset the project's cost of providing the affordable housing units.
- Regarding patio doors, the highest rated widely available patio door is rated at STC 37, which would not comply with Policy NOI-1.5(d). Adding a second storm door on the outside to provide additional sound attenuation would increase project costs by approximately \$500,000, and would create maintenance issues similar to those relating to the use of double windows. The cost saving associated with providing single patio doors would help offset the project's cost of providing the affordable housing units.
- With regard to wall construction, Policy NOI-1.5(d) would require the use of both "double" walls and staggered stud walls within the project. The former would increase the project's wall framing budget by approximately \$387,000. Therefore, the cost savings associated with providing standard wall construction would help offset the project's cost of providing the affordable housing units.

As set forth above, the requested incentive would clearly help offset the project's cost of providing the affordable housing units.

b. Construction Start Time

Applicant also requests a modification to the construction hours regulated by Municipal Code section 9.30.070.B, which limits weekday construction activities to the hours of 8:00 am to 5:00 pm. Applicant's incentive request is to allow construction activities to commence at 7:00 am

Monday through Friday. In the construction industry, construction workers historically begin at 7:00 am and end around 3:30 pm (with a 30 minute lunch break). All other projects performed by the project's construction team are based on these hours of operation.

Granting this incentive will help offset the project's affordable housing costs. The project has a projected 27-month construction duration based on working 5 days per week, beginning at 7:00 am. Moving the start time to 8:00 am, or anytime thereafter, will increase the costs of construction by requiring additional days on the jobsite. Starting construction activities at 8:00 am would extend the construction schedule by 5 hours per week, or approximately 2.67-days per month (based on 22 workdays per month). This equates to an additional 72-workdays, or a delay of approximately 3.25-months from start of construction to occupancy.

Therefore, granting the incentive would help offset the project's costs of providing the affordable units by reducing the construction timeline by over three months.

B. Development Standard Waivers

1. Legal Background

In addition to, and separate from, requests for incentives, a density bonus applicant may request a waiver or reduction of development standards that would have the effect of physically precluding the construction of the project at the densities or with the incentives permitted under the statute. (Gov. Code § 65915(e)(1).) "A 'development standard' includes a site or construction condition, including, but not limited to, a height limitation, a setback requirement, a floor area ratio, an onsite open-space requirement, or a parking ratio that applies to a residential development pursuant to any ordinance, general plan element, specific plan, charter, or other local condition, law, policy, resolution, or regulation." (Gov. Code § 65915(o)(1).)

A request for a development standard waiver neither reduces nor increases the number of incentives to which the developer is otherwise entitled. (Gov. Code § 65915(e)(2).) Furthermore, there is no limit on the number of waivers that may be issued. Even if the developer does not submit a request for a development standard waiver, a city is prohibited from applying a development standard that would have the effect of physically precluding the construction of the project at the densities or with the incentives permitted under the DBL. (Gov. Code § 65915(e)(1).)

As with incentives, recent case law has clarified the legal principles regarding waivers. The *Schreiber* case confirms that a city may refuse a request to waive or reduce development standards *only* if it makes written findings that the waiver or reduction would have a specific adverse impact on the public health or safety. (*Id.* at 556; Gov. Code § 65915(e)(1).) In addition, another new case upholding a city's approval of a density bonus project confirmed that waivers are based on the project as proposed by the developer: "even if we assume the Project as designed is inconsistent with some of the City's design standards, the Density Bonus Law would preclude the City from

applying those standards to deny this project.” (*Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755, 775.) Therefore, a local agency may not respond to a waiver request that a project could be redesigned to avoid the need for a waiver. (*Id.* at 774-775 [rejecting argument that the project “could have been built more horizontally” to comply with design standards.”].)

As the state Department of Housing and Community Development recently advised another local agency, “the courts have made it very clear that if a project qualifies under [the Density Bonus Law], and if waivers are needed to physically allow that project to go forward with the incentives and concessions granted, the waivers must be granted.” (1/20/22 Notice of Violation to City of Encinitas.)

2. *Project Waiver Requests*

This section identifies the development standards set forth in the MU-NB-120 zoning district that was adopted in February, from which Applicant will seek waivers or reductions.

The **first** waiver request relates to the 75-foot building maximum height (New Table 18.05.030-3.), and the four additional feet of height allowed for parapet walls (Municipal Code section 18.05.030(D)(1)). The project’s maximum building height is currently designed to approximately 78’ 1” and 81’ 7” to the parapet. Therefore, imposing a 75-foot height maximum would physically preclude construction of the project as proposed.

The **second** waiver request relates to the 3.0 maximum FAR. (New Table 18.05.030-1.) The project, as currently designed, will have a FAR of 3.27. Imposing a 3.0 maximum FAR would physically preclude construction of the project as proposed.

The **third** request seeks a waiver from Municipal Code section 18.04.060.B.1., which imposes a 125-foot limit on building length. The project as proposed will have an approximately 367-foot building length at El Camino Real, thus this development standard would physically preclude construction of the project.

The **fourth** waiver request applies to Municipal Code section 18.04.060.B.2., which requires at least an 18-inch roofline offset for each 1-3 units exposed on that elevation, and which prohibits large, continuous roof planes. The project will have four units along the north side of El Camino Real frontage and along the EVA elevation, thus requiring this development standard would physically preclude construction of the project.

The **fifth** waiver request relates to Municipal Code section 18.04.060.B.3., which imposes window trim and recess standards. The project will satisfy this requirement on exterior facing facades, but not within the interior courtyards. Therefore, imposition of this development standard would physically preclude construction of the project as designed.

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The **sixth** request seeks a waiver from Municipal Code section 18.04.060.B.5, which sets forth façade articulation requirements. At this point, it appears that the project may comply with these requirements, but Applicant will seek a waiver in the event that the City determines that the project lacks the required articulation. In such a case, mandating that the project comply with this development standard would physically preclude construction of the project.

Therefore, the City is required by statute to grant the six requested waivers above. SummerHill reserves its rights to identify any necessary additional waivers that may be necessary as a result of the entitlement process.

SummerHill and its development team look forward to working with Staff on this great transit-oriented development project that will provide the City with 242 residential units for a broad range of households and income levels. Please contact me if you have any questions regarding the foregoing.

Very truly yours,



David H. Blackwell

CC: Elaine Breeze, SummerHill Apartment Communities
Richard Norris, SummerHill Apartment Communities