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September 5, 2019

VIA E-MAIL AND U.S. MAIL

Gian Martire
Associate Planner
City of Cupertino Planning Division
10300 Torre Ave.
Cupertino, CA 95014-3255

Re: Westport Cupertino Density Bonus Waiver Requests
Our File No.: 24070.001

Dear Mr. Martire:

By email dated August 29, 2019, you requested further written support for the two density bonus waiver requests for height and slope setback. This letter provides such support. We assume that no further documentation is needed for the third requested waiver, that of the dispersion requirement for affordable housing. Your letter of December 21, 2018, says that you already have sufficient information to support that waiver request, and I am assuming that your statement to that effect still holds true.

As summarized in your letter of December 21, 2018, those two requested waivers for the Project are for:

a. The General Plan establishes a height limit of 45'. Height waivers for the mixed-use Building 1(91'-9" top of tower element) and senior housing Building 2 (73'-9" top of tower element).

b. Slope setback requirements for Buildings 1 (1:2.08) & 2 (1:1.47) where 1:1 is required with the General Plan.

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 density waivers. You had earlier asked for a justification of why the waivers are necessary to build the five 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. See also *Wollmer v. City of Berkeley* (2011), 193 Cal.App.4th 1329, 1347 (Waivers must be granted for a development that meets the criteria of the Density Bonus Law).

That this is the proper interpretation was made clear by recent 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 limit 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) 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 the developer 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 developer’s architect.

Support for the One Finding That the City must Make

As noted in your letter, the primary finding that must be made by the City is the one based on the Government Code citation above. As stated in Cupertino Ordinance Section 19.56.040(B)(3):

Finding. “[T]he development standards that are requested to be waived will have the effect of physically precluding the construction of the development with the density bonuses and incentives or concessions.”

Support for Finding. The Project Architect has summarized the main features of the Project in past correspondence. 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. As noted, 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 studios to townhouse units. Some of its salient features include:

- Providing 242 units, inclusive of 39 BMR Senior Living Housing units.
- The number of BMR Senior Living Housing units has been increased from 30 units in the previous application to 39 units.
- There is a broad mix of housing that provides a variety of housing types not limited to “flats”
 - Fifty percent (50%) of the total units are multifamily, including 1-, 2-, and 3-bedroom units; 34% are Rowhomes and Townhomes; 16% 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 Cupertino Senior Center;
 - Creates walkable access to on-site Central Green as well as 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 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).

It would not be feasible to build at this density without concentrating the higher density apartments and Senior Living Housing units, as well as the retail, on the eastern portion of the site. This establishes the need to construct Buildings 1 and 2 higher than 45 feet, and thus closer to Stevens Creek Boulevard than allowed by the setback.

The Project Architect has calculated that if these buildings were limited to 45 feet in height, approximately 72 multi-family units would be lost from Building 1 and nine BMR Senior Living Housing units from Building 2. This would represent a loss of one-third of all residential units. Thus, the Project could not be built at the density allowed by the General Plan and could not support the senior affordable housing or the retail component; in fact, the Project would no longer be commercially viable and thus could not be built at all.

Findings for Denial Cannot be Made.

In order to deny the requested waivers, the City would have to make one of the following three findings, which cannot be made:

Finding for Denial 1. That the incentive or concession, or waiver 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 incentive or concession, or waiver 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 subsection, "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 incentive or concession, or waiver is 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.

Gian Martire
September 5, 2019

If you need any further information, please don't hesitate to ask.

Very truly yours,

BERLINER COHEN, LLP



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