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November 30, 2018

VIA E-MAIL AND U.S. MAIL

Eric S. Phillips, Esq.
Goldfarb & Lipman LLP
1300 Clay Street, Eleventh Floor
Oakland, CA 94612

Re: Westport Cupertino Application
Our File No.: 24070-001

Dear Mr. Phillips:

This letter is written in response to your letter dated August 10, 2018 concerning the Westport Project (the "Project") Application. We appreciate your analysis and your efforts to ensure that the City of Cupertino follows State law in evaluating this Project and look forward to working with you on this exciting Project. I will address each of your major topics in turn.

1. Housing Accountability Act.

We concur with your conclusion that the Project is a "housing development project" within the purview of the Housing Accountability Act, Govt. Code Sec. 65589.5 (the "HAA"). We believe that with the resubmittal that is being made to the City, the Application should be deemed complete. The Staff may have certain concerns with the plans as submitted, or may offer suggestions for changes that Staff thinks will improve the Project, but any such concerns or suggestions do not affect the completeness of the Application. Accordingly, we look forward to receiving from the City substantive comments regarding consistency with objective standards and criteria of the General Plan, the Heart of City Plan and other applicable sources of objective criteria, within the 60-day time limit established in the Housing Accountability Act.

I would like to address your comment that "nothing in the Housing Accountability Act prevents the City from evaluating the Project for consistency with the General Plan, the Heart of the City Specific Plan, and other applicable sources of development standards. Furthermore, provided that the City does not deny the Project or impose conditions reducing its density without making appropriate findings, nothing prevents the City from imposing conditions of approval on the Project to bring it into conformance with applicable standards, even if some of the standards are subjective in nature."

Your statement quoted above is overbroad; under the HAA, as recently amended, the City's ability to try to condition the Project based on its interpretation of subjective standards is severely limited. In response to such attempts by cities the Legislature has recently substantially changed the HAA to reduce the discretion of cities to modify a project. For example:

- The HAA is to be interpreted in support of housing. As stated in Sec. 65589.5(a)(1)(L): "It is the policy of the state that this section should be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing."

- Imposing conditions can violate the HAA's proscription on reducing density based on non-objective factors: "For purposes of this section, "lower density" includes any conditions that have the same effect or impact on the ability of the project to provide housing." Sec. 65589.5(i).

- Finally and most importantly, Staff can no longer assume that their interpretation of subjective standards will be upheld by the courts. The recent amendments to the HAA reverse the normal presumption in favor of any "reasonable" staff interpretation. As now defined, "a housing development project or emergency shelter shall be deemed consistent, compliant, and in conformity with an applicable plan, program, policy, ordinance, standard, requirement , or other similar provision if there is substantial evidence that would allow a reasonable person to conclude that the housing development project or emergency shelter is consistent, compliant, or in conformity." Sec. 65589.5(f)(4).

2. Density Bonus Application Requirements.

Your letter states an official position regarding the required density for the Project. Actually, the 204 units (25 du/ac.) that were originally proposed for the Westport Project were based on direction received from the City's Planning Staff that the maximum density that could be achieved on the site should be based on the 200 Housing Units allocated for the site in the General Plan and the Heart of the City Specific Plan, even though the General Plan Land Use Map identifies the maximum density allowed for this site as 30 units per acre. Your letter and Planning Staff have now confirmed that the maximum density allowed in the General Plan should serve as base maximum density for purposes of requesting density bonus waivers or concessions.

Accordingly, the Project has been revised to meet the maximum 30 du/ac. density (237 units), plus a density bonus request of five additional units. The Project now proposes 242 dwelling units, and it includes 39 affordable senior housing units (a senior citizen housing development as defined in Civil Code Sec. 51.3) in accordance with Govt. Code Sec. 65915(b)(1)(C). The Project is thus entitled to a density bonus either as an affordable project or as a senior project under Govt. Code Sec. 65915.

You state that the Project must also apply for a conditional use permit in order to reach the General Plan density of 30 du/ac. Since, under your interpretation, the Project cannot obtain a density bonus without going to 30 du/ac., this means that a discretionary permit (i.e., a conditional use permit) would be required in order to obtain a density bonus. This appears to violate a specific provision of the Density Bonus Law: "The granting of a density bonus shall not require, or be interpreted, in and of itself, to require a general plan amendment, local coastal plan amendment, zoning change, or other discretionary approval." Govt. Code Sec. 65915(f)(5) (emph. added).

The Application is requesting three waivers of development standards that would have the effect of physically precluding the development of the Project at the density proposed by the Applicant. As noted in your letter, those waivers include (1) height waivers for Building 1 (residential/commercial) and Building 2 (senior housing), (2) slope setback requirements for the same two buildings and (3) the requirement that the affordable units be dispersed.

The third waiver may not be legally necessary, since enforcement of the requirement would prevent the senior housing from being built in conformance with State and Federal requirements. As your office is well aware, under State law, new housing that is developed as senior housing is subject to specific design features such as doors and hallways accessible by wheelchairs, grab bars and railings for those who have difficulty walking, additional lighting in common areas, and access provided without the use of stairs, and must be designed to encourage social contact by providing at least one common room and common open space. (Civil Code Section 51.2(d)). All senior housing must a have rules and restrictions clearly restricting occupancy consistent with federal and state occupancy requirements and must verify occupancy by reliable surveys and affidavits. (42 U.S.C. Section 3607(b)(2); Civil Code Section 51.3(c).) The policies, procedures and marketing must demonstrate that the senior development as a whole is intended for seniors. (54 Fed. Reg. 3255 (Jan. 23, 1989)).

These requirements do not allow housing intended for seniors to be dispersed throughout a development or to be integrated into other buildings in the development. In a development that includes both senior and non-senior housing, as is proposed here, the senior units must be clearly separated from non-senior housing, preferably in a separate building designed for seniors with separate entrances and facilities. Clearly these requirements cannot be met if the senior affordable units are dispersed throughout the development. Consequently, requiring the affordable units to be dispersed throughout the project would physically preclude development of the proposed affordable senior housing.

3. Information required by the City's BMR Housing Mitigation Program Procedural Manual.

Please note that the Project Application did include an Affordable Housing Plan as required by the City's BMR Housing Mitigation Program Procedural Manual. It has been modified to address the changes in the number of residential units proposed as part of the Density Bonus request.

4. Other Comments Regarding Elements of Design and Parcelization.

As you suggest, the Applicant and design team have met with the City's consultant architect who provided input on the design of the project. The Project has incorporated some of these comments to the extent that the recommended revisions can be incorporated into a project that meets the Applicant's development goals and the City's objective criteria as established in the General Plan, the Heart of the City Specific Plan and other objective standards.

Regarding your comments on parcelization, as stated the General Plan has language and policies that "discourage" parcelization. However, this is not an objective standard. Similarly, your statement regarding the desire of the City to have a better mix of housing options within the Project is not an objective standard, and not even a stated objective policy or goal in the General Plan.

Very truly yours,

BERLINER COHEN, LLP

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