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February 26, 2019

VIA E-MAIL & U.S. MAIL

Gian Paolo Martire  
Associate Planner  
City of Cupertino  
10300 Torre Avenue  
Cupertino, CA 95014-3202

RE: Application Incomplete Letter (3) dated December 21, 2018  
21265 Stevens Creek Blvd. (APN#326-27-043, 042)

Dear Mr. Martire:

This letter is a partial response to your letter of Dec. 21, 2018, with respect to the issues of density bonus waivers and claimed need for a conditional use permit. I understand that the Developer's architects will separately respond to other issues in your letter.

Density Bonus Waivers

We understand that as a result of the meeting held with the Developer and City Staff on January 22, 2019, Staff is only now requesting follow-up information regarding our request for waivers a. and b. as identified in your letter. These are for the height and slope setback requirements for Buildings 1 and 2.

Your letter asks for a justification of why the waivers are necessary to build the four 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

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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.4<sup>th</sup> 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.

### Use Permit Application

We continue to believe that no use permit is necessary for this project, and that any requirement for a use permit would violate the Density Bonus Law. As discussed in my letter of Nov. 30, 2018, the original application had been for a density of approximately 25 units per acre (200 base units). In the City’s response letter from your outside attorney, Eric Phillips, dated Aug. 10, 2018, he stated the City’s position that waivers of development standards could not be requested unless the application qualified for a density bonus by proposing a density of 30 units per acre. And you continue to state in your letter that a use permit is required to achieve that density.

So you are saying that we cannot get a density bonus for our original requested density, but cannot go to a qualifying higher density without obtaining a discretionary use permit.

As to the Density Bonus Law, as you know, a discretionary permit cannot be required in order to obtain a density bonus. Govt. Code Sec. 65915(f)(5). Though your letter states that the use permit is not being required to obtain the density bonus, that is the exact effect of your stated position: We cannot get a density bonus unless we develop at 30 units per acre, but we cannot

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develop at 30 units per acre without a discretionary use permit. This interpretation would place the developer in an unacceptable Catch-22 situation.

The position in your letter also is a misinterpretation of the City's own plan. As quoted above, the Density Bonus law provides that a density bonus means "a density increase over the otherwise maximum allowable gross residential density..." Sec. 65915(f). And the phrase "maximum allowable residential density" means:

*"the density allowed under the zoning ordinance and land use element of the general plan, or, if a range of density is permitted, means the maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project. Where the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan, the general plan density shall prevail."* Govt. Code Sec. 65915(o)(2).

In this case, the General Plan Land Use Map shows the Oaks as a Priority Housing Site. The legend to the Land Use Map states that such sites "shall have the densities shown in the Housing Element unless allowed a different density with a State Density Bonus..." Thus, the General Plan tells the reader to look to the Housing Element to see what density is shown for the site.

In the Housing Element, Table HE-5 lists the five Priority Housing Element Sites, of which the Oaks is identified as Site A3. The only reference to density in the Housing Element is contained in this table. Under the heading "Max Density (DUA)" for the Oaks, it says "30." Thus, the density allowed by the General Plan for the Oaks is 30 dwelling units per acre, not 25 or some other number. It is true that another column in Table HE-5 lists 200 as the "Realistic Capacity (units)" for the Oaks, but that is not stated, and cannot be interpreted reasonably, as a density figure. As noted in Mr. Phillips letter of Aug. 10, 2018, "that figure is not a limitation on development, but rather an estimate for purposes of demonstrating that the City has adequately zoned land to accommodate its share of regional housing needs."

Finally, we do not think our reading of the General Plan is actually inconsistent with the development standard you quote from the Heart of the City Specific Plan. But if it is, then since the HOC acts as the zoning for the property, any inconsistency must be decided in favor of the General Plan. See *Wollmer v. City of Berkeley*, 193 Cal.App.4<sup>th</sup> 1329, at 1344. Or, if the development standard in the HOC is interpreted as creating a "range" of densities, then under the Density Bonus Law, clearly the applicant is entitled to propose, without discretionary permit requirement, a density at the top end of the range.

We remind you, as stated in my letter of Nov. 30 that this project is also subject to the Housing Accountability Act. Under the 2017 amendments to that Act, the City is accorded no deference in interpreting its own general plan and zoning. Now, a housing development project shall be deemed consistent with the city's land use plans, codes and regulations, if "there is substantial evidence that would allow a reasonable person to conclude that the housing

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development project or emergency shelter is consistent, compliant, or in conformity.” Govt. Code Sec. 65589.5(f)(4).

In 2017, the Legislature also added the following finding and declaration to the Housing Accountability Act: “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.” Govt. Code Sec. 65889.5(a)(2)(L).

We look forward to working with staff on this matter and trust that staff will take these policy admonitions of the Housing Accountability Act to heart in its application of State law and City codes in order to facilitate the project and enable it to provide much-needed housing for the City.

Very truly yours,

BERLINER COHEN, LLP



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