



707 Wilshire Blvd., 24<sup>th</sup> Floor  
Los Angeles, California 90017  
tel (213) 626-2906  
fax (213) 626-0215  
www.meyersnave.com

Russell E. Morse  
rmorse@meyersnave.com

October 21, 2022

**Via Electronic Mail Only**

Katie Herlihy, AICP  
Community Development Director  
City of Capitola  
420 Capitola Ave  
Capitola, CA 95010  
E-Mail: kherlihy@ci.capitola.ca.us

**Re: 4401 Capitola Drive Affordable Housing Project  
Request for Incentives, Concessions and Waivers Pursuant to the California  
Density Bonus Law (Government Code, § 65915, et seq.)**

Dear Ms. Herlihy:

We represent CRP Affordable Housing and Community Development (“CRP”), owner of the property located at 4401 Capitola Drive, Capitola, California (the “Property”). As you are aware, CRP is proposing to construct a 36-unit, 100% affordable housing project with associated amenities at the Property (the “Project”). This letter provides an analysis of the Project under the State Density Bonus Law and supports CRP’s requests for incentives, concessions and waivers under the Density Bonus Law. We note that CRP has no legal obligation to provide support for its request for incentives, concessions and waivers under the Density Bonus Law, however, CRP has agreed to provide this analysis for informational purposes to assist the City in its review of the Project. (*Schreiber v. City of Los Angeles* (2021) 69 Cal.App.5th 549.) CRP requests the City grant the concessions and waivers requested for the Project pursuant to Density Bonus Law and approve the Project as proposed.

**I. PROPERTY AND PROJECT BACKGROUND**

The Property is an approximately 0.82 acre (35,300 SF) rectangular-shaped site located on the east side of 44<sup>th</sup> Avenue, north of Capitola Road. The Property is located near public transportation including bus stops directly across the street at 44<sup>th</sup> Avenue and Capitola Road and approximately 1,050 feet west of the Property on Capitola Road between 41<sup>st</sup> and 42<sup>nd</sup> Avenues.

The proposed Project consists of a mix of 1-bedroom, 2-bedroom, and 3-bedroom apartment units, configured in two 3-story buildings. The Project will be a 100% affordable

housing project, including approximately 30 low income units, 3 very low income units and 3 extremely low income units.

## II. STATE DENSITY BONUS LAW

Government Code Section 65915, *et seq.*, commonly referred to as the “Density Bonus Law,” was first enacted in 1979 with the aim to address the shortage of affordable housing in California. (*Latinos Unidos Del Valle De Napa Y Solano v. County of Napa* (2013) 217 Cal.App.4th 1160, 1164.) In essence, when a developer proposes to construct a certain percentage of the units in a housing development for low- or very-low-income households, the city or county must grant the developer (1) a “density bonus,” which allows the developer to increase the density of the development by a certain percentage above the maximum allowable limit under local zoning law; (2) one or more itemized concessions and (3) “waivers or reductions” of “development standards.” (Gov. Code, § 65915(b)(1); *Bankers Hill 150 v. City of San Diego* (2022) 74 Cal. App. 5th 755; see also *Schreiber v. City of Los Angeles* (2021) 69 Cal.App.5th 549, 554-555 (*Schreiber*).)

First, the density bonus allows for additional units above the maximum allowed by zoning, to be added to a project based on the amount of affordable housing included in the project. The higher the percentage of affordable units, the higher the percentage of the density bonus allowing a developer to exceed the zoned density. (*Ibid.*) However, an applicant under a Density Bonus Law application is not required to use the density bonus as part of a density bonus project, but may still apply the incentives, concessions and waivers of development standards allowed under the Density Bonus Law.

Second, the incentives and concessions provided under the Density Bonus Law allow an applicant of a density bonus project to avoid City-required development standards<sup>1</sup> to assist in lowering the cost to build a project that includes affordable housing (Gov. Code, § 65915(d)(1).) An “incentive or concession” is defined as a “reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceed the minimum building standards . . . that results in identifiable and actual cost reductions.” (*Id.* at subd. (k)(1).) The law states that a “site development standard” includes setbacks, height limitations, and other requirements imposed by “any ordinance, general plan element, specific plan, charter, or other local condition, law, policy, resolution, or regulation.” (*Id.* at subds. (k)(1), (o)(1).) The applicant is not required to prove the requested incentives will lead to cost reductions; the incentive is presumed to result in cost reductions and the city bears the burden to demonstrate otherwise if it intends to deny the incentive. (*Schreiber, supra*, 69 Cal.App.5th at 555.)

Third, a city must accept an applicant requested waiver or reduction of development standards that would have the effect of physically precluding the construction of a development at the density, or with the requested incentives, permitted by the Density Bonus

---

<sup>1</sup> “‘Concession’ and ‘incentive’ are synonymous in the statute.” (*Schreiber, supra*, 69 Cal.App.5th 555.)

Law. (Gov. Code, § 65915(e)(1).) For example, if a city ordinance imposes a building height limitation, a city must waive that limitation for a development that is eligible for a density bonus if imposing the height limit would physically preclude construction of the proposed building with the requested incentives and at the density allowed by the Density Bonus Law. (*Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755.) There is no financial criteria for granting a waiver. (*Schreiber, supra*, 69 Cal.App.5th 556.) The Density Bonus Law includes very limited exceptions to its requirements and places the burden on a city to establish an exception applies.

### III. CONCESSIONS AND WAIVERS

As discussed above, the Density Bonus Law “incentivizes the construction of affordable housing by allowing a developer to add additional housing units to a project beyond the zoned capacity and secure other incentives in exchange for a commitment from the developer to include deed-restricted affordable units in the project. When a developer meets the requirements of the Density Bonus Law, a local government is obligated to permit increased building density, grant incentives, and waive any conflicting local development standards unless certain limited exceptions apply.” (*Bankers Hill 150, supra*, 74 Cal.App.5th at 763.)

#### A. The Project is Entitled to Up to Four Concessions and Any Necessary Waivers of Development Standards

As provided in Government Code Section 65915(d)(2)(D), because 100% of the units in the Project are designated as affordable to low income residents, the Project is entitled to up to four incentives or concessions. Here, the applicant requests only two concessions, as follows:

1. Use of the existing sidewalk instead of the otherwise required 10-foot wide sidewalk
2. Relaxation of major massing relief of an eight foot (8’) deep recess for every fifty feet (50’) of frontage.

Separate from the density bonus and requests for incentives or concessions, a density bonus applicant may request any number of waivers or reductions of development standards that would “have the effect of physically precluding the construction of a[n eligible] development ... at the densities or with the concessions or incentives permitted by this section.” (Gov. Code, § 65915, subd. (e)(1).) In other words, a density bonus applicant may request a waiver of any development standard (including height) if that development standard prevents the applicant from constructing the affordable housing project as proposed by the applicant. The Density Bonus Law does not set a limit on the number of waivers which can be requested and a request for a development standard waiver does not reduce the number of incentives or concessions to which the applicant is otherwise entitled. (Gov. Code, § 65915(e)(2).) Here, the applicant requests five waivers, as follows:

1. Reduction of the required parking ratio for the project to one (1) parking space per unit
2. Increase in the allowable compact parking ratio from thirty percent (30%) of all required parking spaces to forty-two percent (42%) of required parking spaces
3. Increase in the total building height to thirty-six feet (36') in lieu of the otherwise required twenty-seven feet (27')
4. Decrease in the drive aisle width of the parking area to twenty-two feet (22')
5. Reduction in the required side-yard setback to five feet (5') from the otherwise required ten foot (10') setback.

Each of these concessions and waivers is allowed by the Density Bonus Law and meets the requirements of Density Bonus Law as explained below.

**B. The Requested Concessions and Waivers Satisfy Statutory Requirements for Approval.**

1. Concessions and Incentives

As provided in *Schreiber v. City of Los Angeles* and discussed above, an applicant of a density bonus project is not required to establish that cost reductions will result from the request for incentives or concessions. “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. Accordingly, [an applicant is not] required to show, and [a] city [is] not required to affirmatively find, that the incentives would actually result in cost reductions.” (*Schreiber, supra*, 69 Cal.App.5th at 593.) Regardless, the applicant has agreed to provide justification for its requested concessions for the Project, as described below.

(a) Use of the existing sidewalk

The requested concession for use of the existing sidewalk width will allow for the construction of affordable units including larger-sized dwelling units and would result in a building design and construction efficiencies that reduce affordable housing costs; it enables the developer to expand the building envelope so that the proposed number of affordable units can be constructed and the overall space dedicated to residential uses is increased. The increased building envelope also ensures that all dwelling units are of a habitable size while providing a variety of affordable one-, two-, and three-bedroom units.

(b) Relaxation of major massing relief of eight feet

The requested concession for relief in the articulation/massing requirement will allow for the construction of affordable units including larger-sized dwelling units and would result in a building design and construction efficiencies that reduce affordable housing costs; it enables the developer to expand the building envelope so that additional affordable units can be constructed and the overall space dedicated to residential uses is increased. With the

proposed concession, the project will be able to achieve a more efficient design and thereby lowering the cost of providing affordable housing. The increased building envelope also ensures that all dwelling units are of a habitable size while providing a variety of affordable one-, two-, and three-bedroom units.

## 2. Waivers

The Applicant has requested five waivers of development standards for the Project to ensure the Project could be developed at the proposed density within the physical constraints of the Project site.

(a) Reduction of the required parking ratio to one (1) parking space per unit

The requested waiver for reduction in the parking ratio for the project will allow for the construction of the proposed affordable units and would result in a building design and construction efficiencies that could otherwise not be accommodated; it enables the developer to maximize the use of the lot for residential development and to construct the proposed project with the proposed number of affordable housing units, without which the development would be physically precluded.

(b) An increase in the allowable compact parking ratio to forty-two percent (42%) of required parking spaces

The requested waiver for an increase in the allowable compact parking ratio for the project will allow for the construction of the proposed affordable units and would similarly result in a building design and construction efficiencies that could otherwise not be accommodated; it enables the developer to maximize the use of the lot for residential development and to construct the proposed project with the proposed number of affordable housing units, without which the development would be physically precluded.

(c) An increase in the total building height to thirty feet (36')

The requested waiver for an increase in building height will allow for the construction of proposed affordable units. The otherwise required twenty-seven foot height limit would not support the number of proposed affordable units at the size and affordability as currently proposed; it enables the developer to expand the building envelope so that additional affordable units can be constructed and the overall space dedicated to residential uses is increased, without which the development would be physically precluded.

(d) A decrease in the drive aisle width of the parking area to twenty-two feet (22')

The requested waiver for a decrease in the drive aisle for the surface parking for the project will allow for the construction of the proposed affordable units and would result in a

building design and construction efficiencies that could otherwise not be accommodated; it enables the developer to maximize the use of the lot for residential development, expand the building envelope and to construct the proposed project with the proposed number of affordable housing units, without which the development would be physically precluded.

(e) A reduction in the required side-yard setback to five feet (5')

The requested waiver for reduction in the required side yard setback will allow for the construction of the proposed affordable units and would result in a building design and construction efficiencies that could otherwise not be accommodated; it enables the developer to maximize the use of the lot for residential development, expand the building envelope and to construct the proposed project with the proposed number of affordable housing units, without which the development would be physically precluded.

**C. All Findings Under the Capitola Municipal Code Can be Affirmatively Made.**

Pursuant to Capitola Municipal Code Section 18.03.100, prior to approving a request for a density bonus, incentive, concession, parking reduction, or waiver, the review authority must make certain specific findings as provided in Title 18 of the Zoning Code. As described below, all required findings can be affirmatively made:

1. The residential development project is eligible for a density bonus and for any concessions, incentives, waivers, or parking reductions requested; conforms to all standards for affordability required by Section 65915(c); and includes a financing mechanism for all implementation and monitoring costs

As a housing development project in which 100% of the proposed units are dedicated to low income units, very low income units and extremely low income rental units, the project is eligible for a density bonus pursuant to the Density Bonus Law (Gov. Code Section 65915, *et seq.*) and the City's "Residential Density Bonus" ordinance as codified in Municipal Code Section 18.03. As a 100% affordable housing project, the project is entitled to up to four concessions or incentives under Government Code Section 65915(d)(2)(D) and any number of necessary waivers of development standards. All rents will be set at statutory required levels and all units would be deed-restricted to ensure continued affordability of all affordable rental units for 55 years or a longer period of time if required by the construction or mortgage financing assistance program, mortgage insurance program, or rental subsidy program. The site does not currently contain any residential housing units and thus no rental units would be demolished as part of the project.

2. Any requested incentive or concession will result in identifiable, financially sufficient, and actual cost reductions based upon appropriate financial analysis and documentation required by this section

Pursuant to the recent ruling in *Schreiber v. City of Los Angeles* (2021) 69 Cal. App. 5th (2021), local agencies cannot require density bonus applicants to submit pro formas or other documentation required to prove that requested incentives and concessions are necessary to make the housing development financially feasible. However, for informational purposes, and as described in Section B.1, above, each concession and incentive provides for cost reductions which ensure the development of the affordable housing project at the densities and at the affordability levels proposed by the applicant.

3. If the density bonus is based all or in part on dedication of land, all of the requirements included in Section 65915(g) have been met

No dedication of land pursuant to Government Code Section 65915(g) is proposed as part of the project. The applicant owns the underlying Property and does not seek any additional density under Government Code Section 65915(g).

4. If the density bonus, incentive, or concession is based all or in part on the inclusion of a child care facility, all of the requirements included in Section 65915(h) have been met

No child care facility pursuant to Government Code Section 65915(h) is proposed as part of the project. The applicant does not seek any additional density or concessions under Government Code Section 65915(h).

5. If the incentive or concession includes mixed uses, all of the findings included in Section 65915(k)(2) can be made

The project does not request approval of mixed-use zoning in conjunction with the housing project as an incentive pursuant to Government Code Section 65915(k)(2). No commercial uses are proposed as part of the Project.

6. If a waiver or reduction of a development standard is requested, the development standard would have the effect of physically precluding the construction of the development project at the density or with the incentives or concessions permitted by Section 65915

As described in Section B.2, above, each development standard waiver proposed as part of the Project ensures the development of the affordable housing Project at the densities and with the incentives or concessions proposed by the applicant. Without the proposed

waivers of development standards, the development standards would have the effect of physically precluding the construction of the development project.

#### **IV. CONCLUSION**

We trust the above information will provide the explanation for application of the California Density Bonus Law to the project. We appreciate your continued assistance on this Project. Please do not hesitate to contact us with any questions regarding the contents of this letter.

Very truly yours,



Russell E. Morse

cc: Shawn Cooper, CRP Affordable Housing and Community Development  
Garrett Bascom, CRP Affordable Housing and Community Development

5184203.2