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LAND USE | REAL ESTATE | ENVIRONMENTAL

August 23, 2022

Chair Barba and Members of the Planning Commission
City of Escondido
201 North Broadway
Escondido, CA 92025-2798
Attn: Zack Beck, City Clerk (by email only: zbeck@escondido.org)

Re: Appeal of Condition 11 of Plot Plan No.: PL21-0304

Dear Chair Barba and Planning Commissioners:

I represent Cross Real Estate Investors, LLC ("Cross"), the prospective owner and developer of fifty-four (54) workforce¹ and affordable housing units at 1401 & 1405 S. Escondido Avenue (the "Project"). The Project will create forty-eight (48) workforce units and six (6) affordable housing units on a site with prior residential and commercial uses. On August 23, 2022, the City conditionally approved a Plot Plan for the Project. The purpose of this letter is to appeal Plot Plan Condition 11, which reads as follows:

Condition of Approval 11: **Costs of Municipal Services**. In accordance with the General Plan, the Developer shall fund all on-going operational costs of providing municipal services required for the Project, the amount of such funding shall be in accordance with the special tax levy adopted annually by the City Council based on the project density, unless another amount is approved by the City Council at the time of Project approval. Such funding shall occur through either an agreement to form or annex into a Community Facilities District ("CFD") or the establishment of another lawful funding mechanism reasonably acceptable to the City ("Public Services Funding Agreement"). Projects that elect to annex into the Services CFD shall submit consent forms prior to the first permit issuance if they have not done so already. The provisions of the Public Services Funding Agreement shall specify any terms and limitations necessary to implement the CFD or other funding mechanism to offset the impacts to public services associated with the project. The City Manager, or City Manager's designee, shall be authorized to approve and execute the Public Services Funding Agreement, and the Public Services Funding Agreement shall be finalized prior to the City's issuance of any permit for the Project.

Cross requests the planning commission grant the appeal and strike Condition 11. The Condition essentially requires annexation into CFD No. 2020-1, also known as the City's "Service CFD". Based on the current uncertainty regarding the legality of CFD No. 2020-1, the Condition should be struck. In the alternative, Cross requests the condition be waived in accordance with state Density Bonus laws.

Community Facilities District No. 2020-1 is Legally Unsound

On February 26, 2021, the Building Industry Association of San Diego County filed a Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief against the City of Escondido and

¹ Workforce housing refers to those dwelling units that are naturally affordable to a working population and does not include luxury amenities that would otherwise drive up the price, as with Class "A" projects.

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the City Council of Escondido ("Petition") challenging the legality of Council Resolution No. 2020-44 ("Resolution"), which establishes the requirement of future annexation into the CFD.² The Petition alleges the CFD was improperly formed, the Resolution and the CFD violate California state law and the California Constitution, and that the City Council acted without proper authority, among many other allegations. The lawsuit is underway, and no trial date has been set.

Cross submits the City should not be implementing the CFD and Resolution until the lawsuit is decided. It is arbitrary and capricious to subject Cross to a requirement that is legally questionable, if not unconstitutional.

Cross has also learned the Council approved a sales tax increase ballot measure that will be on the November 2022 election ballot. The measure is popular and expected to pass.³ The purpose of the sales tax increase is to provide a significant infusion into the budget and alleviate the need for development fees over and above the current impact fees, which are already a barrier to affordable and workforce housing.

The City Should Waive the Condition for this Project Under Density Bonus Law

Cross initially submitted a plot plan application for this Project to the City in June of 2021. Since then, construction and other project costs have increased by more than 35%. Due to the affordable housing aspect of the Project, application of the special assessment required by CFD 2020-1 will make the Project economically infeasible. We request the City waive the requirement for this Project as an incentive under California's density bonus law.

Density Bonus Incentive

Due to the provision of affordable units, Cross is entitled to certain incentives under both state and local density bonus law. Cross requests the City grant the concession of waiving annexation into CFD 2020-1 for the Project.

California Government Code section 65915 provides as follows:

(d)(1) An applicant for a density bonus [as requested in accordance with subdivision] (b) may submit to a city, county, or city and county a proposal for the specific incentives or concessions that the applicant requests pursuant to this section, and may request a meeting with the city, county, or city and county. The city, county, or city and county **shall grant the concession or incentive** requested by the applicant unless the city, county, or city and county makes a written finding, based upon substantial evidence, of any of the following:

(A) The concession or incentive does not result in identifiable and actual cost reductions, consistent with subdivision (k), to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c).

² *Building Industry of San Diego County v. City of Escondido, et al.*, Superior Court for the County of San Diego, Case No. 37-2021-00008423.

³ <https://www.sandiegouniontribune.com/communities/north-county/escondido/story/2022-07-17/escondido-sales-tax>

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(B) The concession or incentive would have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon public health and safety or the physical environment or on any real property that is listed in the California Register of Historical Resources and for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact without rendering the development unaffordable to low-income and moderate-income households.

(C) The concession or incentive would be contrary to state or federal law.

(Emphasis added).

Government Code section 65915(k) directs that an incentive or concession “does not limit . . . the provision of direct financial incentives for the housing development” and further notes an applicant may request incentives such as waiving fees or costs.

Escondido Municipal Code (“EMC”) section 33-414(D) allows the City to grant regulatory incentives or concessions proposed by the developer that result in identifiable, financially sufficient, and actual cost reductions that contribute to the economic feasibility of a project. EMC section 33-414(E) allows the City to provide direct financial incentives in the form of a waiver of fees or dedication requirements.

The Project is entitled to three incentives under the state Density Bonus law. The breakdown of the application of density bonus and incentives is as follows:

DENSITY BONUS - 2021 (AB 2345)	
CALCULATION	
Maximum Permitted Density	30 Units
Property Size	1.17 Acres
Allowable Units at Max Density	36
Affordable Units	15% 6
Density Bonus Units	50% 18
Base Units	36
Density Bonus Units	18
Total Units	54
Market Rate Units	48
Affordable Units	6
Total Units	54
% Affordable	13.0%
Incentives	3

A court recently determined the City must have supporting evidence to determine the requested “concession or incentive does not result in identifiable and actual cost reductions” in order to deny the request. *Schreiber v. City of Los Angeles* (2021) 69 Cal.App.5th 549. The law recognizes a presumption the concession or incentive will result in an identifiable and actual cost reduction. “By requiring the city to grant incentives

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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.

This project will provide much-needed infill affordable and workforce housing. In today’s economic climate, with rising interest rates, construction and long-term financing are more difficult to obtain than in recent years. To require an additional \$783 per dwelling unit per year simply makes the project unfinanceable and infeasible. There is no evidence waiver of CFD No. 2020-1 will not result in identifiable and actual cost reductions. There is no evidence waiver of CFD No. 2020-1 will result in a specific adverse impact to public health or safety, or that the concession is contrary to state or federal law. Therefore, Cross respectfully asks the Planning Commission to grant its request to waive annexation into CFD No. 2020-1 as a concession to its affordable project under the state and local density bonus laws.

The CFD No. 2020-1 was established to establish financing for the provision of public services for a new single-family, large-scale master planned community subdivision at the edge of the City limits. There had never been any other development there, and extending necessary public services came with a cost. That cost was covered by CFD No. 2020-1. The City went on to require all new residential projects be included in the CFD. This project is an infill project that is replacing existing development. At least some of the cost contemplated by CFD No. 2020-1 is already provided for in the current budget.

Requiring the annexation into the CFD raises uncertainty for this project. The City will have to evaluate the amount of the tax to be levied against the development. Gov. Code section 53339.3(d) states the special tax cannot be higher than the established tax in the existing CFD, “except that a higher or lower tax may be levied within the territory proposed to be annexed or to be annexed in the future to the extent that the actual cost of providing the services in that territory is higher or lower than the cost of providing those services in the existing district.”

We do not know the cost of those services and the annexation process will not take place until some future time. This uncertainty is untenable for a project like this.

The City has waived the annexation into the CFD in the past—most significantly to the much larger market-rate housing development on the former Palomar Hospital site. This affordable housing project should not bear the financial burdens of market-rate housing.

For the foregoing reasons, Cross respectfully requests the Planning Commission strike the condition requiring annexation into CFD No. 2020-1, or in the alternative, recommend the City Council waive the annexation requirement for this affordable housing project.

Sincerely,



Andrea Contreras

Cc: Andrew Firestine, Director of Development Services (by email only: afirestine@escondido.org)
Sean Nicholas, Principal Planner (by email only: snicholas@escondido.org)