

November 21, 2024

Honorable Members of the Planning Commission  
City of Los Altos  
1 N. San Antonio Road  
Los Altos, CA 94022  
PCPublicComment@losaltos.gov

Re: 4896 El Camino Real – Response to Comment Regarding Affordable Units (D23-0011, CUP23-0001, TM23-0003)

Chair Beninato and Honorable Members of the Planning Commission for the City of Los Altos:

This firm represents the applicant Doheny-Vidovich Partners (the “Applicant”) of the proposed project for a five-story mixed-use development with 33 residential units and approximately 16,140 square feet of office space (the “Project”) located at 4896 El Camino Real (the “Property”) in the City of Los Altos (the “City”).

The Applicant is in receipt of the letter submitted by the League of Women Voters on November 19, 2024. In that letter, the League of Women Voters express its support for the Project generally, but “ask[s] that the square footage of the below-market-rate units (BMRs) be revised given that the BMR units are dramatically smaller than the market-rate units.” The letter claims the Project is inconsistent with the City’s Municipal Code (“LAMC”) at section 14.28.030(C) due to the discrepancy in square footage between the Project’s below-market rate units and market rate units.

As discussed below, the City is prohibited from applying the standard set forth in LAMC section 14.28.030(C) because it is subjective. Even if it could apply the standard, the Project would be deemed consistent with such standard and would use a Density Bonus Law concession or waiver to modify such standard.

LAMC section 14.28.030 is part of the City’s Inclusionary Housing Ordinance and provides “standards” that are generally applicable to multiple-family housing projects. LAMC section 14.28.030(C) states:

“Unless otherwise approved by the city council, all affordable units in a project shall be constructed concurrently with market rate units, shall be dispersed throughout the project, and shall not be *significantly distinguishable* by size, design, construction or materials.” (Emphasis added.)

The term “significantly distinguishable” is not defined either in the City’s Inclusionary Housing Ordinance or in the LAMC more generally and is a non-objective standard that the City cannot apply to the Project.

Under the Housing Accountability Act (codified in Government Code section 65589.5, subs. (a)-(r)), which the City has confirmed applies to the Project,<sup>1</sup> the City cannot deny the Project based on noncompliance with non-objective standards or condition the Project on compliance with a subjective standard if it would reduce Project density. (Gov. Code, § 65589.5, subd. (j).) “Objective” is defined in the Housing Accountability Act as “involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official.” (*Id.*, subd. (j)(9).)

Here, where the term “significantly distinguishable” is undefined, the standard in LAMC section 14.28.030(C) requires personal judgment to make a determination as to consistency with respect to the standard and would therefore be a non-objective standard. Since the standard qualifies as a non-objective standard, the City is prohibited from requiring the Project to comply with such standard.

Even assuming that such standard was treated as an objective standard, the City has not raised any such inconsistency within the required time under the Housing Accountability Act, and the Project is therefore deemed consistent with such standard by operation of law. (Gov. Code, § 65589.5, subd. (j)(2).) A reasonable person would further conclude that the Project is consistent with such standard, and therefore the Project would be deemed consistent. (Gov. Code, § 65589.5, subd. (f)(4).)

In addition, if the City applied LAMC section 14.28.030(C), the Project would use a concession or a waiver under the Density Bonus Law (Gov. Code, § 65915) to reduce or modify the requirements.

The Project proposes a total of thirty-three (33) residential units, including two (2) very low-income units and three (3) moderate-income units. In exchange for setting aside a minimum of 5 percent of the units for very low income households, the Project is eligible for the benefits of the Density Bonus Law, which include one concession and an unlimited number of waivers of development standards. (*Id.*, subs. (b), (d), (e).) The Project has not yet requested any concession despite its eligibility.

A concession is defined broadly to include either “[a] reduction in site development standards or a modification of zoning code requirements...that results in identifiable and actual cost reductions, to provide for affordable housing costs...” (*Id.*, subd. (k)(1).) The state

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<sup>1</sup> For reference, see p. 10 of the Staff Report for the Project, which is available at <https://mccmeetingspublic.blob.core.usgovcloudapi.net/losaltosca-meet-6b7bebea518a49c8a43a73306c3c5b53/ITEM-Attachment-001-08d5fdd50be54d1f9bf9689197f4ea4e.pdf>.

Department of Housing and Community Development (“HCD”) have confirmed that a project may use a concession to modify certain local inclusionary provisions.<sup>2</sup> If needed, the Project would use a concession to modify the “significantly distinguishable” requirement per the City’s Inclusionary Housing Ordinance, because such concession would reduce the amount of square footage required for the below-market rate units, which would result in identifiable and actual cost reductions to provide the Project’s below-market rate units.

The Project also could request an additional waiver per the Density Bonus Law to waive the development standard in LAMC section 14.28.030(C).

A waiver is “a waiver or reduction of development standards that will have the effect of physically precluding the construction of a development” entitled to benefits under the Density Bonus Law. (*Id.*, subd. (e)(1).) “Development standard” is defined broadly as “a site or construction condition, including, but not limited to, a height limitation, a setback requirement, a floor area ratio, an onsite open-space requirement, or a parking ratio that applies to a residential development pursuant to any ordinance, general plan element, specific plan, charter, or other local condition, law, policy, resolution, or regulation that is adopted by the local government or that is enacted by the local government’s electorate exercising its local initiative or referendum power, whether that power is derived from the California Constitution, statute, or the charter or local ordinances of the local government.” (*Id.*, subd. (o)(2).) Waivers can be requested for “any development standard that will have the effect of physically precluding the construction of a development” that meets the Density Bonus Law’s minimum affordable requirements “at the densities or with the concessions or incentives permitted by [the Density Bonus Law].” (*Id.*, subd. (e)(1).)

A local government may deny a requested waiver only under certain, limited circumstances. Specifically, a local government may deny a requested waiver only if granting the waiver “would have a specific, adverse impact . . . upon health or safety, and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact” or “would have an adverse impact on any real property that is listed in the California Register of Historical Resources, or to grant any waiver or reduction that would be contrary to state or federal law.” (*Id.*) Conditions that would have a specific, adverse impact upon the public health and safety “arise infrequently.” (*Id.*; Gov. Code, § 65589.5, subd. (a)(3).)

According to HCD, to obtain a waiver, the “showing or ‘reasonable documentation’ required by the applicant is that the project qualifies for a density bonus.”<sup>3</sup> A project that meets the requirements of the Density Bonus Law is entitled to waivers if they are needed, “period.”

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<sup>2</sup> See p. 3 of HCD’s Letter of Technical Assistance to Sonoma County, available at <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/sonoma-co-hau-704-ta-042624.pdf>, where HCD confirms that “[y]es, a concession can be used to modify certain provisions of an inclusionary ordinance.”

<sup>3</sup> See HCD’s Notice of Violation Letter to the City of Encinitas, available at <https://www.hcd.ca.gov/community-development/housing-element/docs/sdiEncinitas-NOV-012022.pdf>.

(*Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1346–1347; *see also Bankers Hill Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755, 775 [rejecting a claim that a project was not eligible for waivers because it could be redesigned to be more consistent with the city’s development standards].) The City cannot impose redesign requirements on the Project in a manner that would require the Project to seek fewer waivers. (*Id.* at 774-775.) Rather, the Density Bonus Law “provides a developer with broad discretion to design projects with additional amenities even if doing so would conflict with local development standards,” and the City would be in violation of the Density Bonus Law if it failed to waive development standards that would physically preclude construction of the Project. (*Id.*)

The Project, which is entitled to unlimited waivers, could therefore also use a waiver for the development standard set forth in LAMC section 14.28.030(C).

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Please do not hesitate to contact me if you have questions regarding the above. The Applicant looks forward to the Planning Commission’s consideration of the Project.

Sincerely,

Cox, Castle & Nicholson LLP



E.J. Schloss

EJS

cc: Ms. Jia Liu, AICP (Associate Planner)  
Ms. Stephanie Williams (Planning Commission Liaison)