

M David Kroot

July 29, 2016

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BY E-MAIL

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Robert Schultz, Town Attorney
Town of Los Gatos
110 E. Main Street
Los Gatos, CA 95030

Re: Issues Raised at Planning Commission Hearings

Dear Town Attorney Schultz:

We represent the interests of Grosvenor USA Limited and Summerhill Homes (collectively, the "Applicants") in relation to Architecture and Site Application S-13-090 and Vesting Tentative Map M-13-014 (collectively the "Planning Applications") for 320 residences and 66,000 gross sq. ft. of neighborhood commercial space located in the North Forty Specific Plan area (the "Project"). This letter responds to issues raised at the Planning Commission hearings on the North Forty that we had not discussed in previous correspondence. In particular, we are responding to issues raised regarding: (1) whether Project approval with 50 affordable, income-restricted units and 270 market-rate units is consistent with the Town's Housing Element; (2) the Project's eligibility for a density bonus; (3) how the Town can enforce the affordable rent requirements for the senior affordable units; and (4) issues arising under the California Environmental Quality Act (CEQA).

To summarize the detailed discussion below:

(1) Consistency with the Housing Element. Project approval with 50 affordable, income-restricted units and 270 market-rate units is consistent with the Town's Housing Element and would not create a need for rezoning of additional sites. Please see attached e-mail correspondence from the California Department of Housing and Community Development confirming this conclusion.

(2) Eligibility for a Density Bonus. The Project is eligible for a density bonus. The seniors who will be occupying the affordable senior housing are "persons and families" with very low incomes; the density allowed without a density bonus was calculated correctly; and the bonus must be calculated based on all of the properties included in one development application.

(3) Enforcement of Affordable Rent in Senior Units. The Applicants will enter into an agreement with the Town restricting rents in the affordable, income-restricted units in exchange for a density bonus, as required by State law.

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415 788-6336

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213 627-6336

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619 239-6336

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(4) CEQA Conformance. Because the Project review must be ‘by right,’ the Architecture and Site Application is not a “project” and is not subject to any review under CEQA. Consequently the Vesting Tentative Map application qualifies for the “common sense exemption” under CEQA.

Consistency with the Housing Element

In preparing the 2015-2023 Housing Element, the Town needed to designate sites zoned at 20 units per acre, which is considered to be the “appropriate” density for lower income housing in Los Gatos. (Gov’t Code §65583.2(c)(3)(B)(iii).) To meet this requirement, the Town committed to rezoning 13.5 acres on the North Forty property to 20 units per acre – 270 units total -- and to allow housing ‘by right’ on the property.

By adopting the Specific Plan and rezoning the site to allow multifamily housing by right on 13.5 acres of the site at 20 units per acre (270 units total), the Town has created a site that is appropriate for 270 units of lower income housing. State law regards any land zoned at 20 units per acre or more in Los Gatos as being appropriate for lower income housing and therefore meeting the Housing Element’s requirement that the Town make enough land available at appropriate densities to meet its share of regional housing needs.

Speakers at the Planning Commission meeting asked if the Town would be required to find another site for lower income housing if only 50 affordable units are built as part of the Project.

There is no requirement that the housing constructed on a site appropriate for affordable housing *actually* be affordable to lower income households and no requirement that the Town provide additional sites zoned at 20 units per acre if the housing built on the North Forty site is not affordable. The only requirements after adoption of the housing element are contained in Government Code Section 65863. That provision requires only that the number of units shown in the Housing Element not be reduced.

The Project proposes 50 units of affordable, income-restricted housing and 270 units of market-rate housing (with a density bonus), all at a density of 20 units per acre. This more than meets the Town’s obligation to allow development of 270 units on the North Forty at 20 units per acre, and no additional rezoning will be needed to meet the Town’s Housing Element obligations. Please see attached e-mail correspondence from Glen Campora, Assistant Deputy Director, Housing Policy Division, California Department of Housing and Community Development.

Eligibility for a Density Bonus

Mr. Peter Dominick provided e-mail correspondence and oral testimony to the Planning Commission on July 13, 2016 stating that the Project is not eligible for a density bonus. Below we have summarized his comments and responded.

Comment #1: The senior affordable housing is not intended for very low income households, which include “persons and families” of very low income (Health & Safety Code §50105(a)), because the senior units will be age-restricted. As a consequence, the Project is not entitled to a density bonus for very low income housing.

Response: Very low income seniors who will reside in the proposed affordable housing are "persons and families" with very low incomes and so are very low income households. "Persons" are single persons and unrelated persons who elect to live together as one household. "Families" are related persons who live together; in senior housing these are typically married couples. All of the seniors who will live in the proposed housing will be "households" with very low incomes, and so the senior housing will be occupied by very low income households, and the Project is entitled to a density bonus for providing very low income housing.

Comment #2: The density bonus should be calculated over a base density of 223 units, rather than a base density of 237 units, because 237 units cannot be obtained without a waiver of some height requirements.

Response: The definition of a "density bonus" is:

"A density increase over the otherwise *maximum allowable residential density* as of the date of application by the applicant to the city." (Gov't Code §65915(f).) (emphasis added.)

"Maximum allowable residential density" is defined as:

“[T]he 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.” (Gov't Code §65915(o)(2).)

Under this definition, the base density over which the bonus is calculated is effectively determined by looking at the maximum density permitted by the land use element of the general plan, which overrides any zoning limitations.

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The Town's land use element of the general plan, as amended by the Town Council on June 17, 2015, states that the maximum capacity of the North Forty site is 270 units. There are 17 existing units, so the Applicants could have claimed 253 units as the base density and proposed a project of 342 units with the maximum 35 percent density bonus. The proposed project with a base density of 237 units is smaller than allowed by state law, not larger.

Comment #3: The project does not qualify for a density bonus because there is more than one applicant.

Response: A density bonus is provided for a "housing development." (Gov't Code §§65915(a), (b)(1), (f).) The definition of "housing development" contained in the density bonus statute states that:

"For the purpose of calculating a density bonus, the residential units shall be on contiguous sites that are the subject of one development application, but do not have to be based upon individual subdivision maps or parcels." (Section 65915(i).)

The requested North Forty density bonus is for residential units located on contiguous sites that are the subject of one development application. Therefore the bonus has been calculated properly, for one development application. The fact that the single development application is submitted by more than one entity, who are together the "applicant," is irrelevant to calculating the density bonus.

Enforcement of Affordable Housing Requirements

Mr. Rod Teague provided correspondence dated June 20, 2016 asking whether the Town could require the senior units to be affordable under *Palmer/Sixth Street Properties v. City of Los Angeles*, and also asking whether Eden Housing, as a non-profit developer, is eligible to provide affordable housing and to enter into a contract with the Town.

Response. *Palmer* interpreted the Costa Hawkins Rental Housing Act and found that cities could not impose rent limitations as a condition of planning approval.

However, under Costa Hawkins, the Town may limit rents where the owner has "agreed by contract with a public agency in consideration for a direct financial contribution or any other forms of assistance specified in [state density bonus law]." (Civil Code Section 1954.52(b).)

Summerhill and Grosvenor are requesting a density bonus for the North Forty. Consequently the Town may limit the rents in the proposed affordable units.

Summerhill and Grosvenor have agreed to enter into an agreement with the Town to provide the affordable units in exchange for the density bonus. Typically communities add a condition of approval requiring that the agreement be entered into prior to issuance of a building permit or final/parcel map approval.

In addition, Eden Housing intends to receive a “direct financial contribution” in the form of tax credits and other loans and will be required to enter into additional contracts to limit rents. This is also permitted under Costa Hawkins.

There is no requirement that the affordable units be privately funded; in fact, Costa Hawkins anticipates public agency funds to make units affordable. There is also no requirement that the developer be a for-profit entity; most affordable housing developers are non-profits.

Project’s Status under CEQA

The Town has concluded that no additional environmental review is required under CEQA because the Project’s environmental impacts were adequately reviewed in the EIR completed for the North Forty Specific Plan. This conclusion was challenged at the Planning Commission meeting.

Under state law, the Architecture and Site Application is not a “project” and so is not subject to any review under CEQA. The Town’s Housing Element states that approval of housing on the North Forty will be “by right.” Government Code Section 65583.2(i) provides:

“[T]he phrase ‘use by right’ shall mean that the local government’s review of the owner-occupied or multifamily residential use may not require a conditional use permit, planned unit development permit, or other discretionary local government review or approval that would constitute a ‘project’ for purposes of [CEQA]. Any subdivision of the sites shall be subject to all laws...A local ordinance may provide that ‘use by right’ does not exempt the use from design review. *However, that design review shall not constitute a ‘project’ for purposes of [CEQA].*” (emphasis added)

Although the Vesting Tentative Map is subject to CEQA, it qualifies for the “common sense exemption” (CEQA Guidelines Section 15061(b)(3)) because it merely implements the exact plan shown in the Architecture and Site Application. (*See Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal. 4th 372, 389 (common sense exemption applicable where airport land use plan merely incorporated existing general plan and zoning provisions).)

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If you have any questions, please feel free to contact us.

Sincerely,

GOLDFARB & LIPMAN LLP

A handwritten signature in black ink, appearing to read 'B. E. Kautz', written over the printed name of Barbara E. Kautz.

BARBARA E. KAUTZ

cc: Don Capobres, Harmonie Park Development Co.
(representing Grosvenor USA Limited)
Wendi Baker, Summerhill Homes
Andy Faber, Berliner Cohen LLP
Laurel Prevetti, Town Manager
Joel Paulson, Community Development Director

Barbara Kautz

From: Campora, Glen@HCD <Glen.Campora@hcd.ca.gov>
Sent: Thursday, July 28, 2016 12:55 PM
To: Barbara Kautz
Subject: HCD clarification of RHNA and Housing Element requirements

Ms. Kautz:

I'm replying to your request for HCD to clarify State Housing Law and Departmental administration in determining local government compliance regarding Regional Housing Need Allocation (RHNA) and Housing Element requirements. You indicate clarity is desired concerning RHNA credit for residential units approved, permitted, and/or built since the start of the RHNA projection period and before and after adoption of an housing element determined to comply with statutory requirements. From our conversation (July 13, 2016) and emails (July 22 and 28), I am in agreement with the positions you summarized. Following are additional clarifications.

RHNA is a housing need "capacity" *planning* requirement (sites, zoning, and densities) to accommodate and facilitate housing development, among four income categories, by private sector housing developers; RHNA is not a "production" requirement. Government Code 65583(b)(2) expressly states "*It is recognized that the total housing needs ... may exceed available resources and the community's ability to satisfy this need within the content of the general plan requirements*"

Once the adopted housing element satisfactorily identifies and establishes housing sites (zoning, densities, and program actions) for all income category RHNA, the local government is responsible to maintain equivalent "established" capacity in the event the local government makes subsequent changes (zoning and densities) to established sites before development is proposed. For 'by right' sites, the local government is further responsible to ensure the site is developed at the minimum density required by State law. After a Developer has acquired an established site, the Developer can choose to propose a housing project with a different configuration of unit rent or sale levels for different income categories resulting in some or all of the development not satisfying the RHNA income category *goals* applicable to a particular site. In such situations, the local government is not responsible to establish additional comparable sites for any remaining (unmet) income category RHNA.

During the housing element update process until adoption of a compliant housing element, RHNA credit for units approved, permitted, or built (since the start of the RHNA projection period) is allowed to enable the local government to plan and update the housing element for fewer units (reduction in RHNA after RHNA credit). RHNA credit is allowed since the start of the RHNA projection period which generally precedes the Housing Element planning period and adoption due date by at least two years in allowing one year for the regional planning agency to plan and distribute RHNA shares to each local government and one year for local governments to update and adopt the housing element. RHNA credit can be taken for each income category upon the local government demonstrating unit credit for a particular income category was taken based on:

- subsidies, financing or other mechanisms that ensure affordability (e.g., MHP, HOME, or LIHTC financed projects, inclusionary units or other requirements); or

- actual rents or sale prices.
more information is available at: http://www.hcd.ca.gov/housing-policy-development/housing-element/hn_phn_regional.php

Glen A. Campora

Assistant Deputy Director, Housing Policy Division (HPD), Suite 500
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Barbara Kautz

From: Barbara Kautz <bkautz@goldfarblipman.com>
Sent: Wednesday, July 27, 2016 7:48 PM
To: Campora, Glen@HCD
Subject: Requirements for Development on Site Appropriate for Lower Income Housing
Attachments: Los Gatos Adopted Housing Element 2015.PDF

Glen –

Our clients Grosvenor Americas and SummerHill Homes have proposed a project on a site designated in the Town of Los Gatos Housing Element as appropriate for 240 units of lower income housing and 30 units of moderate income housing. (Table H-2, page 21; Housing Element attached.) The Town promised to rezone 13.5 acres of the site to permit 270 units at a density of 20 units per acre. (Action HOU-1.7, page 27.) It has adopted a specific plan that has rezoned the site as promised.

The project proposed on the site by Grosvenor and SummerHill would contain 50 senior affordable units (49 very low income units, and 1 moderate-income manager's unit) and 270 market-rate units, for a total of 320 units, including an 83-unit density bonus. All of the units are being developed at a density of 20 units per acre. This proposal exceeds the number of units (270) shown on the site in the Housing Element.

Members of the public are concerned that, because only 50 units are affordable, the Town will be required to zone another site at 20 units per acre to accommodate 220 units (the required 270 units minus 50 units).

It is our understanding that the only requirement now imposed by Section 65863 is to ensure that the number of units shown in the Housing Element is not reduced. There is no requirement that units actually be affordable. The current proposal by Grosvenor and SummerHill exceeds the number of units shown in the Housing Element. Therefore, approval of the current application will not create any new obligations for the Town of Los Gatos to rezone other sites.

Can you please confirm that our understanding is correct? Thanks for your help.

Barbara E. Kautz

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Goldfarb & Lipman LLP

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Barbara Kautz

From: Barbara Kautz <bkautz@goldfarbblipman.com>
Sent: Thursday, July 21, 2016 5:58 PM
To: Campora, Glen@HCD
Subject: "RHNA Credit" for Housing Construction

Glen –

Thanks for the discussion last week about "RHNA Credit" issues. As I mentioned, this is one of the most frequent questions we are asked by clients, usually either: "Does the city/county get RHNA credit if it approves this affordable housing project" or "Does the city/county lose RHNA credit if it approves this project?"

Below is my understanding of the "RHNA Credit" issue. Please let us know if this is correct! Thanks for your help.

Before Housing Element Adopted

Before a city's or county's housing element is adopted, the city or county can reduce its share of the regional housing need (i.e., receive RHNA 'credit') for any units built between the start of the 'projection period' (the period in which housing need was determined) and the date the housing element was due. (Gov't Code Section 65583.1(d).) For instance, in the ABAG area, the 'projection period' started on January 1, 2014, but housing elements were not due until January 2015, so cities and counties could receive a credit for any units built between January 1, 2014 and the housing element due date.

To receive this RHNA credit for lower income units, any units built must *actually* be affordable based on actual or projected rents and sales prices. For instance, if a 100-unit project with 20 low-income units and 80 market-rate units had been built in a city in the ABAG area between January 1, 2014 and the housing element due date, the city could have reduced its RHNA by 20 low-income units and 80 above moderate-income units.

After Housing Element Adopted

After the Housing Element is adopted, cities and counties are required to implement the policies adopted in the Housing Element. The RHNA is no longer reduced by the number of units built.

In preparing their housing elements, cities and counties need to demonstrate that they have adequate sites to accommodate their RHNA at each income level. To accommodate their RHNA for lower income households, they need to zone enough sites at appropriate densities (usually 20 to 30 units per acre) to accommodate the need. (Gov't Code Sections 65583(c), (c)(1); 65583.2(c).)

For instance, if a community's lower income RHNA is 300 units, and the sites must be zoned at 20 units per acre, the community must zone at least 15 acres at 20 units per acre. State law regards any land zoned at the appropriate density or higher densities as being appropriate for affordable housing and therefore meeting the Housing Element's requirement that the community make enough land available at appropriate densities to meet its share of regional housing needs.

There is not a requirement that all of the housing constructed on sites suitable for lower income housing actually be affordable. If non-affordable housing is built on a site suitable for lower income housing, the city or county is not required to find another site suitable for lower income housing. However, the number of units shown on the site in the Housing Element cannot be reduced unless consistent with the housing element and unless there are other sites zoned at the same density adequate to accommodate the lost RHNA. (Gov't Code Section 65863.)

For instance, if a city designates a site as suitable for lower income housing and states that it can accommodate 300 units at 20 units per acre, the city must ensure that any approved development includes at least 300 units at 20 units per acre. However, the housing developed on the site is not required to be affordable. The density cannot be reduced below 300 units unless another site is zoned at 20 units per acre to make up the shortfall. (Other statutes, such as density bonus law and the Housing Accountability Act, may not allow the city to reduce the proposed density even if the city finds another site.)

Construction of affordable housing in one planning period does not reduce a city or county's RHNA in the next planning period. For instance, if affordable housing is constructed in 2016 in the ABAG area, that would not reduce a community's RHNA for the next housing element due in 2023. Constructing market rate housing on a site suitable for lower income housing, but with the specified density and number of units, also does not increase a community's RHNA for the next housing element.

Summary

To summarize:

1. Before a housing element is adopted, communities may reduce their RHNA by the number of housing units actually constructed at each income level between the start of the 'projection period' and the housing element due date.
2. After the housing element is adopted, the RHNA can no longer be reduced. Communities must ensure that the *number* and *density* of units constructed on designated housing element sites is consistent with what is shown in the housing element, but they are not required to limit construction to lower income housing on sites that are suitable for lower income housing.

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