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M E M O R A N D U M

To: Rob Schultz, Town Attorney

From: Sabrina Teller and Jim Moose

Date: August 26, 2016

Re: North 40 Specific Plan Phase I – legal opinion on public comments regarding State Density Bonus Law application and related issues

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This memorandum provides our legal analyses and opinions regarding the merits of some of the public comments regarding the application of the State Density Bonus Law and related points relating to the North 40 Specific Plan Phase I application for a new multi-use development consisting of 320 residential units, including 49 affordable senior units and approximately 66,800 square feet of commercial area. In this memo, we address the legal arguments asserted in the communications from Peter Dominick (July 13, 2016 email to Planning Commission) and certain comments from Angelia Doerner (August 15, 2016 letter to Town Council), as well as an additional issue you requested that we consider relating to the definition of "mixed use" development.

I. Summary

We conclude that the fact that the project's affordable housing is proposed to be age-restricted does not conflict with the definition of "very low income households" in the Health and Safety Code and that the project may be entitled to demand the maximum density bonus of 35 percent because it proposes to reserve over 11 percent of its residential units to very low income senior residents.

We further conclude that the correct calculation of the base density of the project site is based on the maximum allowable density of the general plan designation for the site (270 units), subtracting the existing residential units on the site (asserted to be between 16 and 19 units), for a base density of at least 251 units. The applicant proposes its base density as 237 units, which does not exceed the maximum legal base density.

The fact that the "applicant" for the development project is a partnership of more than one entity is of no relevance or import for the application of the density bonus law provisions, because the involvement of more than one entity in one

proposed enterprise does not impede or conflict with the overall purpose and intent of the law, which is to facilitate the approval and construction of more affordable housing.

The record for this project indicates that an application for a project proposing substantially the same number of units, with a similar percentage of affordable units and seeking waivers of certain design standards was submitted well before January 1, 2015, and therefore the density bonus law's requirements for the provision of replacement housing on project sites with existing housing are probably not applicable to this project. In any event, the affordable housing that is proposed for the site would meet and exceed the number and size of the existing units, thereby providing adequate replacement units if that requirement does apply here.

We are unable to confidently determine whether the stand-alone commercial components of the proposed development require the granting of concessions or waivers from the Town's design standards, such as height requirements, because the definition of "mixed-use" development in the law does not clearly exclude such commercial development. Based on the focus in the density bonus law statute on *housing* developments and the purpose to facilitate more affordable housing, it seems unlikely, although far from certain, that a court would interpret the density bonus law to require the Town to grant such a waiver to the non-residential portion of the project. There may be other reasons for the Town to consider such concessions or variances, just not necessarily under the mandatory density bonus law requirements.

II. Dominick Comments

First Bullet Point – Mr. Dominick asserts that the proposed 49 senior housing units may not qualify as very low income housing for the sake of the 35 percent density bonus calculation because they will not be provided to *all* very low income persons and families (i.e., including non-seniors). Mr. Dominick asserts that the definition of "very low income households" in the California Health and Safety Code section 50105 does not encompass age-restrictions.

Response - Health and Safety Code section 50105 defines "very low income households" as "persons and families whose incomes do not exceed the qualifying limits for very low income families as established and amended from time to time pursuant to Section 8 of the United States Housing Act of 1937." The Health and Safety Code does not otherwise define "persons and families" except in terms of income levels. Neither the Health and Safety Code nor the Government Code's provisions relating to land use and housing indicate that the term "persons and families," as used in this definition, was intended to exclude potential tenants who are older than a certain age. Notably, section 29.10.020 of the Town Municipal

Code broadly defines "family" as "one (1) or more persons who comprise a single household and who live together as a single housekeeping unit." Individual seniors are certainly "persons," and married or related senior couples would seem to qualify as "families" even if they do not have children living with them.

Indeed, a leading appellate court opinion interpreting the density bonus law involved a senior affordable housing project, and the court gave no indication that the age of the tenants was an issue. In *Wollmer v. City of Berkeley*,[1] the court upheld the respondent city's application of the law, by which the city had granted the project proponent a 30 percent unit bonus on the basis of its number of low-income-affordable units. The ages of the tenants were irrelevant. The density bonus law specifies that it is the applicant, not the agency, who elects whether to seek a bonus based on the percentage of affordable housing units proposed or whether, instead, to seek a bonus based on an age restriction on the tenants (without consideration of their income). (Gov. Code, § 65915, subd. (b)(2).) These are two separate categories of housing recognized by statute (a "housing development for lower income households" versus a "senior citizen housing development"). Here, the applicant has proposed to reserve more than 11 percent of its total units to very low income persons who are also seniors; therefore, the maximum 35 percent density bonus is applicable. (Gov. Code § 65915, subd. (f)(2).)

If the project applicant were proposing to restrict potential tenants by age *without* regard to income, then the project would be a "senior citizen housing development" under the density bonus law and Civil Code sections 51.3 and 51.12 and would only be entitled to a 20 percent density bonus, as set forth in Government Code sections 65915, subdivisions (b)(1)(C) and (f)(3). But because the project will be restricting tenants firstly based on their income and only then to an older subset of that group, the project applicant may legitimately elect to obtain the higher density bonus percentage based on number of units reserved for very low income persons and families.

Second Bullet Point – Mr. Dominick disputes the validity of the base number of units assumed for the project, calculated by the Town and the applicant as 237. He believes the basis could not be more than 223, which is the total number of units proposed (320), subtracting the 97 units that the applicant states would be infeasible without the requested waiver of building height requirements.

Response - Mr. Dominick appears to misunderstand how the density bonus law specifies that the base density must be calculated. The law states that the starting point for determining a density bonus is the "maximum allowable residential

[1] (2011) 193 Cal.App.4th 1329.

density as of the date of the application…." (Gov. Code, § 65915, subd. (f).) "Maximum allowable residential density" is defined as "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." (Gov. Code, § 65915, subd. (o)(2).) In the event of any conflict between the zoning and the general plan, the general plan's maximum density prevails.

Here, the Town General Plan states that the maximum capacity of this project site within the North 40 Specific Plan is 270 units. There are represented to be 16 to 19 existing units on the site, which would be subtracted in calculating how many additional units could be constructed under the maximum density allowed under the General Plan. So the applicant could have claimed 251 or 254 units as the base density, but it proposed a smaller number of units, 237, meaning that it self-restricted the final number of units it could have proposed with the application of the maximum 35 percent density bonus to the project.

Third Bullet Point – Mr. Dominick asserts that the density bonus law allows only a single applicant for a project invoking the law, and that the partnership of Grosvenor USA Limited and Summerhill Homes for this project's application violates the intent of the density bonus law.

Response – While Government Code section 65915 refers to "an applicant," it nowhere specifies that an "applicant" may not consist of more than one entity working in a legal partnership on a particular project. The density bonus law does not give any indication that the use of the singular term "applicant" was intended to exclude partnerships; rather, it seems more likely that the term was used because project applications are typically submitted on behalf of one named entity. Moreover, an interpretation of the statute that allows such partnerships to reap the advantages provided in the law seems entirely consistent with the purpose and intent of the statute, which is to increase the amount of affordable housing in the State.

The project application proposes the requisite "housing development" to qualify for a density bonus, in that it proposes more than five residential units on contiguous sites that are the subject of one development application. (Gov. Code, § 65915(i).) The term "applicant" is not defined in the statute, and therefore there is no legal basis for presuming that the statute excludes partnerships acting under a single applicant's identity.

III. Doerner Comments[2]

Replacement of Existing Units – Ms. Doerner asserts that, because the applicant made no request for a density bonus until after June 2015, Government Code section 65915, subdivision (c)(3), applies and prohibits density bonuses, incentives, or concessions or for this project, contrary to the representation in the August 11, 2016 staff report.

Ms. Doerner also contends that because of the age-restriction for the proposed new units, the replacement units do not meet the spirit and intent of "replacement" under the density bonus law if families with children or persons under the age limit who currently reside on the project site are displaced by the senior housing development.

Response – Government Code section 65915, subdivision (c)(3)(A), disqualifies an applicant for a density bonus or other incentives or concessions if existing rental units are present on the project property, or if the dwelling units have been vacated or demolished in the five-year period preceding the application, or were subject to rent restrictions or occupied by lower or very low income households, unless the proposed housing development replaces those units with affordable units of equivalent size or type, or both. Section 65915, subdivision (c)(3)(C), provides that subparagraph (A) does not apply to an applicant seeking a density bonus if the application was "submitted to, or processed by" a city before January 1, 2015.

Counsel for the applicant asserts that the application for the project was submitted on November 14, 2013. The applicant further asserts that the original version of the project described in its initial application materials is substantially similar to that version that was eventually deemed complete in spring 2016, in that (i) the total number of units was similar, (ii) a similar portion of those units would be reserved for low-income seniors, and (iii) prior to 2015, requests for height exceptions similar to the current waiver requests were made.

Assuming the Town's files support those representations, we conclude that the replacement housing requirement in section 65915, subdivision (c)(3)(A), may not apply. We reach this conclusion because, as early as 2013, an application was made that: requested more units than the maximum allowable density under the General Plan; included affordable housing components; and requested exceptions to fixed standards such as height requirements. Even if the applicant did not

[2] In this memo, we address only Ms. Doerner's comments relating to the replacement unit requirement for project applications submitted after January 1, 2015.

formally or expressly invoke the "density bonus law" in its communications with the Town until 2015, there was an application filed before 2015 for a housing development on the proposed site that could not be approved without a density bonus and waiver of certain otherwise applicable development standards. Such an application impliedly invoked the density bonus law because the proposed project could not have been approved without the application of that law.

Section 65915, subdivision (c)(3)(C), provides that the replacement housing requirement "*does not apply to an applicant seeking a density bonus for a proposed housing development if his or her application was submitted to, or processed by*, a city, county, or city and county before January 1, 2015." (Italics added.) This provision does not say that the "application" must have been expressly for the bonus, rather than for the housing development as a whole. As development applications routinely do evolve over time, often over months or years, before being finally approved, it is reasonable to interpret this provision as referring to the submittal or processing of the housing development application.

In fact, an important earlier provision describing the basic mechanism of the density bonus process supports this broader view. Section 65915, subdivision (b)(1), provides that a city shall grant one density bonus, incentives or concessions "*when an applicant for a housing development seeks and agrees to construct a housing development*" that will contain some percentages of units for lower or very low income persons or families or senior housing. From this early context in the statute, it is reasonable to interpret subdivision (c)(3)(C) as referring to the original application for a housing development, and not to a separate, express, or later application for a density bonus.

Regarding Ms. Doerner's assertion that the units to be constructed in the proposed housing development do not satisfy the statute's requirement for replacement units of "equivalent size or type, or both," the statute itself does not define "equivalent size or type." Size suggests an objective calculation based on either square footage of dwellings or bedroom units. The concept of "type" is open to a variety of interpretations, including building type (apartment, duplex, detached single-family house, townhouse), affordability to income levels, age of residents, or architecture. We reviewed the legislative history for AB 2222 (West), which shows that the Legislature added the requirement for replacement housing in 2014. The bill analyses and committee reports also do not define "equivalent size and type," but they do suggest that the primary focus of the requirement was on maintaining affordability levels.

The applicant's counsel's letter dated August 22, 2016 notes that there is a bill (AB 2556) currently pending in the State Senate for a third reading to clarify the replacement housing provisions. The bill provides that equivalent size means the same total number of bedrooms in the replacement units. The bill would also

delete the references to "type," so that ambiguity may go away, at least. If that bill passes and is signed, then according to the applicant's counsel, the proposed project would meet and exceed that requirement for bedrooms as well as square footage of the units, potentially accommodating a greater number of residents than the existing units. [3]

IV. Mixed-Use Development

You asked for analysis regarding the definition of "mixed-use development" and whether the requested waiver of height requirements under the density bonus law should apply to the entire development proposal, including the three stand-alone commercial buildings, or whether those must be excluded because they may not be considered mixed-use.

Under the portion of the Government Code that concerns housing elements, section 65589.5 explains that a local agency is prohibited from denying or restricting a "housing development project" for low-income residents by imposing design review standards unless the agency makes certain findings spelled out in the statute. (Gov. Code, § 65589.5, subd. (d).) Subdivision (h)(2) defines "housing development project" as "a use consisting of any of the following:

> (A) Residential units only.
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> (B) *Mixed-use developments consisting of residential and nonresidential uses in which nonresidential uses are limited to neighborhood commercial uses and to the first floor of buildings that are two or more stories. As used in this paragraph, "neighborhood commercial" means small-scale general or specialty stores that furnish goods and services primarily to residents of the neighborhood.*
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> (B) Transitional housing or supportive housing." (Italics added.)

Section 65589.5's definition of "housing development project" could be interpreted a couple of different ways with respect to the type of commercial uses that can be considered part of the project. It could be read to require that "nonresidential uses" must be *both* neighborhood commercial *and* be found on the first floor of buildings. Or it could be interpreted to treat these two items as separate categories, i.e., that "neighborhood commercial" is one allowed category of nonresidential uses and "first floor [nonresidential] uses" is another. If the

[3] For this specific question, we have relied on the applicant's counsel's representation of the number of bedrooms in the existing units and their square footage, but we have not independently verified that assertion.

second interpretation is correct, however, the stand-alone commercial buildings with no residential units that are proposed within the North 40 project would have to meet the definition above for "neighborhood commercial." We did not find any case law interpreting this section and the meaning of "mixed-use development."

The density bonus law has a somewhat different definition of "housing development." Government Code section 65915, subdivision (i) provides that:

> "Housing development," as used in this section, means a development project for five or more residential units. For the purposes of this section, "housing development" also includes a subdivision or common interest development, as defined in Section 4100 of the Civil Code, approved by a city, county, or city and county and consists of residential units or unimproved residential lots and either a project to substantially rehabilitate and convert an existing commercial building to residential use or the substantial rehabilitation of an existing multifamily dwelling, as defined in subdivision (d) of Section 65863.4, where the result of the rehabilitation would be a net increase in available residential units. 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. The density bonus shall be permitted in geographic areas of the housing development other than the areas where the units for the lower income households are located.

Section 65915, subdivision (k) goes on to define "concession or incentive":

> k) For the purposes of this chapter, concession or incentive means any of the following:
>
> (1) A reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceed the minimum building standards approved by the California Building Standards Commission as provided in Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code, including, but not limited to, a reduction in setback and square footage requirements and in the ratio of vehicular parking spaces that would otherwise be required that results in identifiable, financially sufficient, and actual cost reductions.
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> (2) *Approval of mixed-use zoning in conjunction with the housing project if commercial, office, industrial, or other land uses will reduce the cost of the housing development and if the commercial, office, industrial, or other land uses are compatible with the housing project and the existing or planned development in the area where the proposed housing project will be located.*

(3) Other regulatory incentives or concessions proposed by the developer or the city, county, or city and county that result in identifiable, financially sufficient, and actual cost reductions.

While the density bonus law's definition of "housing development" includes a reference to "one development application," which could include proposed developments of varying land-use types on contiguous sites, the concession and incentive definitions only refer to commercial uses in the context of approving *mixed use zoning* to support the overall cost of the housing development. Given that the housing element law defines mixed-use in such a way that may not apply to stand-alone commercial developments, our conclusion is that the Town may not be under any obligation to extend the height waiver request to the stand-alone commercial buildings proposed within the project site because they do not include any residential component. This statute, however, is far from clear, and as far as we could determine, this issue of whether purely commercial buildings (even for "neighborhood commercial" uses) can be granted waivers from development standards simply because they are included in a development application which also includes housing to which the density bonus law applies has not been decided by any court yet. Therefore, we cannot confidently predict how a court might interpret these provisions as applied to this project.