

-----Original Message-----

From: John Shepardson [mailto:shepardsonlaw@me.com]

Sent: Friday, August 19, 2016 4:07 PM

To: Laurel Prevetti; BSpector; Marico Sayoc; Steven Leonardis; Rob Rennie; Marcia Jensen; Robert Schultz; Council; Don Capobres; Wendi Baker

Subject: No. 40: Questions re Density Bonus

Laurel:

I suggest the staff address the following questions before the next meeting:

1. What is the effect of the 2013 application on the density bonus issues?
2. What is the effect of the reapplications after 1/1/2015 on the density bonus issues?
3. When did the developer first apply for a density bonus? Did the original application include a request for a density bonus?
4. Did the town accept and deem submitted an application for a density bonus? When?
5. What are the town's policies for acceptance and submittal of an application for a density bonus?
6. How, if any, did the creation of the specific plan for the No. 40 affect the process of applying for a density bonus?
7. Is the process the City of Los Angeles following the same or similar to the one, if any, in Los Gatos?

Respectfully,

John Shepardson  
Los Gatos resident

**From:** Maria Ristow [mailto:[ristows@comcast.net](mailto:ristows@comcast.net)]  
**Sent:** Monday, August 22, 2016 10:22 AM  
**To:** Council  
**Subject:** North 40: How NOT to create "open space"

Here is the "park" at Lester Square/Montecito (Swnason Ford).

With concerns about how open space will be available at the North 40, please consider putting in language prohibiting fencing/walls around the park/paseos, and prohibit any allowance to make those spaces private, as has been done at this patch of grass in the middle of asphalt. Drought-ignorant, not available to the public, and unshaded.

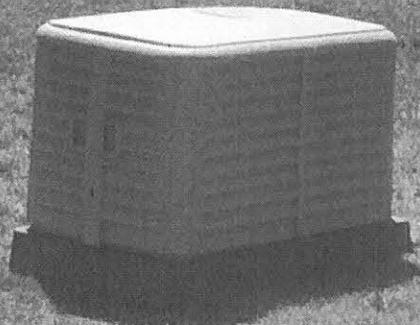
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*Maria Ristow*  
*Los Gatos Community Alliance*



Montecito  
Park  
PRIVATE  
For use by  
HOA members.

Children At Play  
  
NO Poop and Pee Zone



**From:** Barbara Kautz [<mailto:bkautz@goldfarblipman.com>]  
**Sent:** Tuesday, August 23, 2016 3:18 PM  
**To:** Laurel Prevetti; Joel Paulson  
**Subject:** Letter Responding to Issues Raised

Laurel and Joel –

Attached for the Town's review and consideration is a letter, and related attachments, regarding issues raised at the last Council meeting. We would appreciate your distribution of this to the Town Council. Please feel free to contact us if you have any questions.

We have sent the letter separately to the Town Attorney.

**Barbara E. Kautz**  
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California  
LEGISLATIVE INFORMATION

**AB-2556 Density bonuses.** (2015-2016)

**SECTION 1.** Section 65915 of the Government Code is amended to read:

**65915.** (a) When an applicant seeks a density bonus for a housing development within, or for the donation of land for housing within, the jurisdiction of a city, county, or city and county, that local government shall provide the applicant with incentives or concessions for the production of housing units and child care facilities as prescribed in this section. ~~All cities, counties, or cities and counties~~ *A city, county, or city and county* shall adopt an ordinance that specifies how compliance with this section will be implemented. Failure to adopt an ordinance shall not relieve a city, county, or city and county from complying with this section.

(b) (1) A city, county, or city and county shall grant one density bonus, the amount of which shall be as specified in subdivision (f), and incentives or concessions, as described in subdivision (d), when an applicant for a housing development seeks and agrees to construct a housing development, excluding any units permitted by the density bonus awarded pursuant to this section, that will contain at least any one of the following:

(A) Ten percent of the total units of a housing development for lower income households, as defined in Section 50079.5 of the Health and Safety Code.

(B) Five percent of the total units of a housing development for very low income households, as defined in Section 50105 of the Health and Safety Code.

(C) A senior citizen housing development, as defined in Sections 51.3 and 51.12 of the Civil Code, or a mobilehome park that limits residency based on age requirements for housing for older persons pursuant to Section 798.76 or 799.5 of the Civil Code.

(D) Ten percent of the total dwelling units in a common interest development, as defined in Section 4100 of the Civil Code, for persons and families of moderate income, as defined in Section 50093 of the Health and Safety Code, provided that all units in the development are offered to the public for purchase.

(2) For purposes of calculating the amount of the density bonus pursuant to subdivision (f), an applicant who requests a density bonus pursuant to this subdivision shall elect whether the bonus shall be awarded on the basis of subparagraph (A), (B), (C), or (D) of paragraph (1).

(3) For the purposes of this section, "total units" or "total dwelling units" does not include units added by a density bonus awarded pursuant to this section or any local law granting a greater density bonus.

(c) (1) An applicant shall agree to, and the city, county, or city and county shall ensure, the continued affordability of all very low and low-income rental units that qualified the applicant for the award of the density bonus 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. Rents for the lower income density bonus units shall be set at an affordable rent as defined in Section 50053 of the Health and Safety Code.

(2) An applicant shall agree to, and the city, county, or city and county shall ensure that, the initial occupant of all for-sale units that qualified the applicant for the award of the density bonus are persons and families of very low, low, or moderate income, as required, and that the units are offered at an affordable housing cost, as that cost is defined in Section 50052.5 of the Health and Safety Code. The local government shall enforce an equity sharing agreement, unless it is in conflict with the requirements of another public funding source or law. The following apply to the equity sharing agreement:

(A) Upon resale, the seller of the unit shall retain the value of any improvements, the downpayment, and the seller's proportionate share of appreciation. The local government shall recapture any initial subsidy, as defined in subparagraph (B), and its proportionate share of appreciation, as defined in subparagraph (C), which amount shall be used within five years for any of the purposes described in subdivision (e) of Section 33334.2 of the Health and Safety Code that promote home ownership.

(B) For purposes of this subdivision, the local government's initial subsidy shall be equal to the fair market value of the home at the time of initial sale minus the initial sale price to the moderate-income household, plus the amount of any downpayment assistance or mortgage assistance. If upon resale the market value is lower than the initial market value, then the value at the time of the resale shall be used as the initial market value.

(C) For purposes of this subdivision, the local government's proportionate share of appreciation shall be equal to the ratio of the local government's initial subsidy to the fair market value of the home at the time of initial sale.

(3) (A) An applicant shall be ineligible for a density bonus or any other incentives or concessions under this section if the housing development is proposed on any property that includes a parcel or parcels on which rental dwelling units are or, if the dwelling units have been vacated or demolished in the five-year period preceding the application, have been subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of lower or very low income; subject to any other form of rent or price control through a public entity's valid exercise of its police power; or occupied by lower or very low income households, unless the proposed housing development replaces those units, and either of the following applies:

(i) The proposed housing development, inclusive of the units replaced pursuant to this paragraph, contains affordable units at the percentages set forth in subdivision (b).

(ii) Each unit in the development, exclusive of a manager's unit or units, is affordable to, and occupied by, either a lower or very low income household.

(B) For the purposes of this paragraph, "replace" shall mean either of the following:

(i) If any dwelling units described in subparagraph (A) are occupied on the date of application, the proposed housing development shall provide at least the same number of units of equivalent size ~~or type, or both,~~ to be made available at affordable rent or affordable housing cost to, and occupied by, persons and families in the same or lower income category as those households in occupancy. *If the income category of the household in occupancy is not known, it shall be rebuttably presumed that lower income renter households occupied these units in the same proportion of lower income renter households to all renter households within the jurisdiction, as determined by the most recently available data from the United States Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy database.* For unoccupied dwelling units described in subparagraph (A) in a development with occupied units, the proposed housing development shall provide units of equivalent size ~~or type, or both,~~ to be made available at affordable rent or affordable housing cost to, and occupied by, persons and families in the same or lower income category ~~in the~~ *as the last household in occupancy. If the income category of the last household in occupancy is not known, it shall be rebuttably presumed that lower income renter households occupied these units in the same proportion of affordability as the occupied units— lower income renter households to all renter households within the jurisdiction, as determined by the most recently available data from the United States Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy database.* All replacement calculations resulting in fractional units shall be rounded up to the next whole number. If the replacement units will be rental dwelling units, these units shall be subject to a recorded affordability restriction for at least 55 years. If the proposed development is for-sale units, the units replaced shall be subject to paragraph (2).

(ii) If all dwelling units described in subparagraph (A) have been vacated or demolished within the five-year period preceding the application, the proposed housing development shall provide at least the same number of units of equivalent size ~~or type, or both,~~ as existed at the highpoint of those units in the five-year period preceding the application to be made available at affordable rent or affordable housing cost to, and occupied by, persons and families in the same or lower income category as those persons and families in occupancy at that time, if known. If the incomes of the persons and families in occupancy at the highpoint is not known, ~~then one-half of the required units shall be made available at affordable rent or affordable housing cost to, and occupied by,~~ *it shall be rebuttably presumed that low-income and very low income renter households occupied these units in the same proportion of low-income and very low income persons and families and one-half of the required units shall be made available for rent at affordable housing costs to, and occupied by, low-income persons and families— renter households to all renter households within the jurisdiction, as determined by the most recently available data from the United States Department of Housing and Urban Development's Comprehensive Housing Affordability Strategy database.* All replacement calculations resulting in fractional units shall be rounded up to the next whole number. If the replacement units will be rental dwelling units, these units shall be subject to a recorded affordability restriction for at least 55 years. If the proposed development is for-sale units, the units replaced shall be subject to paragraph (2).

(C) Notwithstanding subparagraph (B), for any dwelling unit described in subparagraph (A) that is or was, within the five-year period preceding the application, subject to a form of rent or price control through a local government's valid exercise of its police power and that is or was occupied by persons or families above lower income, the city, county, or city and county may do either of the following:

(i) Require that the replacement units be made available at affordable rent or affordable housing cost to, and occupied by, low-income persons or families. If the replacement units will be rental dwelling units, these units shall be subject to a recorded affordability restriction for at least 55 years. If the proposed development is for-sale units, the units replaced shall be subject to paragraph (2).

(ii) Require that the units be replaced in compliance with the jurisdiction's rent or price control ordinance, provided that each unit described in subparagraph (A) is replaced. Unless otherwise required by the jurisdiction's rent or price control ordinance, these units shall not be subject to a recorded affordability restriction.

(D) For purposes of this paragraph, "equivalent size" means that the replacement units contain at least the same total number of bedrooms as the units being replaced.

~~(C)~~ (E) Paragraph (3) of subdivision (c) Subparagraph (A) 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.

(d) (1) An applicant for a density bonus pursuant to 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 is not required in order 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).

(B) The concession or incentive would have a *specific 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 specific*, adverse impact without rendering the development unaffordable to low- and moderate-income households.

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

(2) The applicant shall receive the following number of incentives or concessions:

(A) One incentive or concession for projects that include at least 10 percent of the total units for lower income households, at least 5 percent for very low income households, or at least 10 percent for persons and families of moderate income in a common interest development.

(B) Two incentives or concessions for projects that include at least 20 percent of the total units for lower income households, at least 10 percent for very low income households, or at least 20 percent for persons and families of moderate income in a common interest development.

(C) Three incentives or concessions for projects that include at least 30 percent of the total units for lower income households, at least 15 percent for very low income households, or at least 30 percent for persons and families of moderate income in a common interest development.

(3) The applicant may initiate judicial proceedings if the city, county, or city and county refuses to grant a requested density bonus, incentive, or concession. If a court finds that the refusal to grant a requested density bonus, incentive, or concession is in violation of this section, the court shall award the plaintiff reasonable attorney's fees and costs of suit. Nothing in this subdivision shall be interpreted to require a local government to grant an incentive or concession that has a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon health, safety, or the physical environment, and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact. Nothing in this subdivision shall be interpreted to require a local government to grant an incentive or concession that would have an adverse impact on any real property that is listed in the California Register of Historical Resources. The city, county, or city and county shall establish procedures for carrying out this section, that shall include legislative body approval of the means of compliance with this section.



## North 40 Project Summary and Justification

### Summary:

Phase I of the North 40 is a comprehensive proposal by Grosvenor, SummerHill Homes, and Eden Housing to realize the Town's vision for the areas described as the Lark and Transition Districts. The proposal is for a master plan that will provide continuity with the development of future phases, including the Northern District. In this proposal we believe that we have brought The Town's Draft Specific Plan, including the Specific Plan Vision Statement and Guiding Principles, to life.

Approximately 66,000 square feet of retail and restaurant offerings, including an intimate 20,000 +/- square foot Market Hall, are proposed in the Transition District to serve this new community as well as the existing surrounding neighborhoods.

The residential homes proposed include diverse residential types that target the Town's unmet needs: for young professionals, move-down buyers and seniors. These include 60 senior affordable apartments directly above the Market Hall, 88 high-quality move-down condominiums adjacent to the senior housing, and 183 homes designed with the young professional or couple in mind. All new homes will be complimented by and provide convenient access to goods and services in the new neighborhood retail shops. A network of paseos, parks, and gathering spaces linked by orchard trees and community gardens provide open space that is well over 30% of the project area, with beautiful view corridors and places for residents to come together.

The proposed community is a celebration of the Los Gatos quality of life, and focuses on the Draft Specific Plan's Vision Statement and Guiding Principles:

### Town Council Vision Statement:

*The North 40 reflects the special nature of our hometown. It celebrates our history, agricultural heritage, hillside views and small town character. The North 40 is seamlessly woven into the fabric of our community, complementing other Los Gatos residential and business neighborhoods. It is respectful of precious community resources and offers unique attributes that enrich the quality of life of all our residents.*

Guiding Principles:

- *The North 40 will look and feel like Los Gatos*
- *The North 40 will embrace hillside views, trees, and open space.*
- *The North 40 will address the Town's residential and/or commercial unmet needs.*
- *The North 40 will minimize or mitigate impacts on the Town's infrastructure, schools, and other community services.*

Open Spaces

The Draft Specific Plan requires a minimum of 30% of each application to be dedicated as open space, which is more open space than is found in many existing Los Gatos communities. Because the open space requirements are such a prominent element of the Draft Specific plan, the open spaces created within the proposed community are more than merely green areas or parks to meet a minimum requirement. Instead, the greens have been thoughtfully designed as buffers between existing roadways, connecting paseos, community gardens, gathering places, and view corridors. The open space elements will be a prominent feature, linking the districts and future residents while paying tribute to the agricultural history of the property. In addition, the amenities provided within the open spaces will not only appeal to the young professionals, seniors and move-down buyers but will also complement the existing open space offerings within the Town. Overall, the proposal includes over 40% of the area as open space (30% is required) and over 23% as "green" open space (20% is required), which demonstrates the focus that these spaces have been given in driving the design of the community.

The applicant has enlisted Los Gatan Les Kishler to advise on the design, maintenance and programming of community gardens and orchard treatments. Together with the project's landscape architects, the vision for the proposed open space programming has been established, and includes the following:

**Orchard Buffers and Plantings:** A 30' orchard buffer is proposed both along Lark Avenue and Los Gatos Boulevard along the property frontage. The area along Lark Avenue will include a multi-use trail that can be utilized by pedestrians and bicyclists, and offers path through the orchard trees. A vineyard will greet community members as they enter the neighborhood serving retail area in the Transition District. The majority of the orchard plantings are fruit-bearing, and will provide opportunities for community or local group harvesting. Based on recommendations, a number of varieties are proposed, which work together to maintain long-term soil fertility as well as a diverse offering of produce, including almond, apricot, apples, peaches, citrus, persimmons and pomegranate. In addition being located within the buffer along

existing roads, the orchard treatments are continued along A Street and within the paseos.

**Community Gardens:** Transition and Lark District residents will be able to connect in the joint community gardens in the Central Community Park. Thirty nine plots are programmed in the community park, so community members will be able to adopt-a-plot. The gardens strive to bring together the young professionals, seniors and move down buyers in one location. Additional smaller raised garden beds will be included in the open space plaza of the Eden building to provide more gardening opportunities for the seniors as Eden has had great success with this program in the past. Finally, a community garden is proposed for an onsite restaurant use. This garden will not only grow produce that can be utilized in the restaurant, but will also offer a staging area for cooking demonstrations.

**Paseos and View Corridors:** In addition to the Grand Paseo found on the southeast portion of the property, numerous paseos (in connection with right-of-ways) have been strategically situated to unite the residents and provide view sheds towards the hillsides. In addition to A Street, there are three paseos that offer southern views, and multiple paseos and pedestrian corridors that provide views to the east. Further, these paseos offer connectivity throughout the districts, which will encourage pedestrian and bicycle use within the North 40.

**Additional Amenities:** A variety of additional active and vibrant open space amenities are proposed. These include places to gather with neighbors, unwind, relax, and embrace the outdoor lifestyle that Los Gatans relish. A bocce court in the Central Community Park, multiple fire pits, large outdoor communal grilling and dining areas, a dog park and walking trail for four legged friends, turf areas with sun shades and hammocks can all be found in the park and paseo areas. In addition, the move-down buyers will enjoy a resort-like common plaza area complete with pool, exercise facilities, and lounge chairs. The retail portion of the property will host a vineyard, café seating and relaxing plaza spaces. Together, the districts will provide a unique synergy of amenities.

### **Residential Program:**

Between the Lark and Transition Districts, five distinct residential programs will be offered, all tailored to meet the Town's unmet needs for places for young professionals, empty nesters, and income-restricted seniors to live. These include 88 high-end "move down" condominiums,



60 senior affordable apartments directly above the Market Hall, and 183 homes designed with the young professional or couple in mind. The floor plans are as diverse as the people that will live here, with a range of square footages and creative design. Focus has been given to what each generation wants on the inside of their homes, such as gourmet kitchens for move down buyers who love to entertain and media spaces and offices for the young professionals. Exteriors have also been carefully designed to include elements that are both contemporary while remaining true to the agrarian roots of the property. Finishes such as wood trim, corrugated metal, and barn doors compliment grand windows and terraces. Finally, products are parked in either podium-garages (Move Down and Senior) or private garages (Young Professional) to meet the Specific Plan parking requirements.

**Move Down Condominiums:** 88 condominiums ranging in size from approximately 1,300 to 2,200 net square feet have been designed with the move-down Los Gatos resident in mind. This buyer may have a much larger home that they no longer want to maintain and are ready to move into a full-service condominium while retaining their Los Gatos address. Semi-private elevators provide access to the units, providing secure and exclusive access to residents who are accustomed to an estate lifestyle. Concierge services enables the owner to travel without any worries about security or maintenance surprises. A resort-style pool, work out facility, and lounge area offers a place to relax, work-out and mingle with neighbors. Interior space boasts gracious entries, great rooms for entertaining, and luxurious master suites and retreats. Large private terraces are accessed from each unit and compliment the indoor-outdoor lifestyle.

**Senior Affordable Apartments:** A community's senior residents are often unable to maintain their long time residences within a community and they must move into a home designed to fit their needs and budget. Unfortunately, the ability of these residents to stay within the community they know and love can be very difficult. The senior affordable apartments proposed with this plan will provide this opportunity, with elevator access and direct proximity to the neighborhood serving retail in the Transition district. Accessibility will be provided by elevators and drive up parking, and the community garden on the plaza will provide an opportunity to grow food and get to know your neighbors. Easy walkability to goods and services complete the ease of what could otherwise be a difficult transition. While 54 units are required to fulfil the Town's BMP program requirements, 60 affordable senior units are proposed (10% more BMPs than are required for the project). Additional information on the senior affordable apartments and Eden's extensive experience in programming this product type is attached in the BMP program details.

**Young-Professional Residences:** 183 homes and flats in three product designs are proposed with the young professional in mind. Averaging 1.89 bedrooms and approximately 1,500 square feet, these homes offer a place that the next generation of young Los Gatos will want to live. The Draft Specific Plan requires 15% of the units to be two story; however, this plan far exceeds this requirement with over 25% of the homes having two-story elements. A range of product types include the Garden Cluster, Rowhome, and Courtyard Cluster Homes. Nineteen floor plans provide this buyer with the options and variety that they desire. Media rooms, home offices, open floor plans, loft living, and large screen walls for gaming and movie watching offer a work at home, play at home lifestyle. Bedrooms on separated levels provide for roommate opportunities, home offices, or space for visitors. Contemporary finishes such as open-tread stairs, concrete countertops, and large windows provide bright, current, and comfortable living. Exterior spaces range from intimate living-level open spaces (which are fenced for a dog) to gracious terraces and second story porches. These private open spaces feed off the main living area to allow for additional space to hang out and relax with friends.

#### **Retail/Commercial Program:**

This application establishes the retail component of the Transition District which is intended to be the community hub of the new North 40 neighborhood. The neighborhood serving retail will become a place to draw this part of Los Gatos together to integrate the new North 40 community into its surroundings. It features a mix of community focused retail which is anchored by the Market Hall, an approximately 18,000 square feet hall that will feature artisan foods and products. The remaining 48,000 square feet of commercial space will include personal services, soft goods, and restaurants/cafes.

The transition district retail hub provides a common amenity for the residents of the new neighborhood. Millennial's and empty-nesters are beginning to exhibit a similar taste in living environments—living near cafes, restaurants, and every day personal service needs. While they may not desire similar home styles, they do share the desire to interact with neighbors and friends.

The Transition District works as a stand-alone retail program but is intended to be integrated in the larger hybrid-retail program that is currently envisioned in the Specific Plan. This retail hub has been designed in a way that allows it to seamlessly plug into future development in the Northern District. The program hopes to elevate the quality and design of retail offerings along Los Gatos Boulevard while complementing recently completed developments in close



proximity. The transformation of this stretch of Los Gatos Boulevard will improve the quality of the experience of driving along the boulevard while also increasing property values in the areas.

**Exceptions:**

The vast majority of the proposal adheres to or exceeds the requirements of the Draft Specific Plan, including open space percentages, two-story requirements. Limited exceptions are being requested based on exceptional product design and offerings and the proposal meeting or exceeding the Draft Specific Plan's Vision Statement and Guiding Principles.

**Height Measurement:** The Draft Specific Plan's policy is to measure massing from existing grade, which works well for smaller individual development parcels. Page 2-28 in Section 2.7.4 states: *"d. Maximum building height shall be determined by the plumb vertical distance from the natural or finished grade, whichever is lower and creates a lower profile, to the uppermost point of the roof edge, wall, parapet, mansard, or other point directly above that grade. For portions of a structure located directly above a cellar, the height measurement for that portion of that structure shall be measured as the plumb vertical distance from the existing natural grade to the uppermost point of the structure directly over that point in the existing natural grade."* The size of the North 40 requires a mass-grading operation for drainage and cut-fill balancing. Once the site is balanced, areas within the project may be higher or lower than existing grade, which makes measuring from "natural" grade an exercise that would require buildings to be designed for each area of grade on the property. After the site is balanced, it is anticipated that the site will average approximately 1.5' higher than existing grade; however, there is also generally a drop from Los Gatos Boulevard to the interior of the site ( in some places as much as 10'). Therefore, even a structure that is 35' will read as being much shorter from Los Gatos Boulevard. In order to achieve a variety of roof pitches, to balance the earthwork for the site (and therefore minimize off-hauling and Green House Gas emissions during construction), and to achieve cross-drainage, it is requested that height be measured from the finished grade of the balanced site.

**Product Height Exception – Conditional Use Permit for the Move-Down**

**Condominiums:**

To respond to the Draft Specific Plan's goal of providing a diverse selection of housing types to serve the Town's unmet needs, the Move Down condominium homes are designed with practical yet luxurious one-level living in mind. Semi-private elevator banks and secured underground parking will attract an empty-nester buyer who expects high-end resort-style living and amenities. The Move Down condominiums are located



above ground-floor retail, which has an expected floor to ceiling height of 15'. To achieve a luxurious feel in interior spaces, generous floor to ceiling heights of up to 10' are proposed for the residential units. These gracious interior clear ceiling heights are necessary to provide an elegant and exceptional condominium home for the discerning Los Gatan move-down buyer.

The Draft Specific Plan references on Page 2-28 Section 2.7.4 the following: "...b. *Transition District - The maximum height for a residential use in the Transition District is 35 feet. An increased height up to 45 feet is allowed in the Transition District if the project provides an additional green open space per Open Space Standards in Section 2.5.3 or is an affordable housing development. Additional height may be granted within the Transition District upon approval of a Conditional Use Permit by the Planning Commission.* c. *Locate buildings greater than 35 feet in height in areas where the existing natural grade is lower than Los Gatos Boulevard....e. Limited towers, spires, elevator and mechanical penthouses, cupolas, roof pitches of 8:12 or greater (either habitable or non-habitable), up to 30% the length of parapet on any given facade, wireless telecommunication antennas, similar structures and necessary mechanical appurtenances and associated screening which are not used for human activity or storage may be higher than the maximum height permitted. All height exceptions described above shall be subject to Architecture and Site Review and approval and must be found consistent with the following findings: i. The building massing and dimensional ratios of building components create a harmonious visual balance and contribute to the architectural rhythm. ii. The height increase is necessary to achieve excellence in architectural design and cannot be accommodated through alternative means such as lowering the building into the ground or reducing overall floor to ceiling heights. iii. Framed views of the hillside ridgeline shall be protected by locating buildings to provide view corridors at key locations. These view corridors should be strategically located within the neighborhood within common areas such as a park, plaza or specific location on a primary street corridor."*

The combination of the gracious retail and residential heights result in an overall building height of between 42' - 45' for the three-story elements of the buildings and 52' - 55' for the limited four-story elements. An additional 5% open space in this area has been provided for the additional height requested between 35' and 45' for the 3 and 4 story elements of the buildings that exceeded 35'. For the limited amount of building elements that exceed 45', the Draft Specific Plan calls for a Conditional Use Permit which is being applied for with this application. In keeping with the intent of the Draft Specific Plan, this increased height request is occurring in the middle and lower

grade region of the site, close to the freeway. This places the increased height in an appropriate place on the site, allowing for the massing of the project to build up from 1 and 2-story buildings along Lark and Los Gatos Boulevard to these taller buildings in the middle of the site. Finally, view corridors are emphasized and available in numerous locations throughout the site plan. Please see Sheet 1.5 which references the limited areas of included in the Conditional Use Permit as well as the proposed view corridors.

**Product Height Exception – Conditional Use Permit for the Senior Affordable Rental Housing:**

The senior affordable housing is proposed at the Heart of the District, above the Market Hall. This location provides a central location to goods and services for future residents to enjoy. Because of the plate height of the Market Hall, the overall height of this building is proposed between 45' - 48', with only limited areas of the building exceeding 45'. The Draft Specific Plan specifies that for affordable units, *"An increased height up to 45 feet is allowed in the Transition District if the project provides an additional green open space per Open Space Standards in Section 2.5.3 or is an affordable housing development. Additional height may be granted within the Transition District upon approval of a Conditional Use Permit by the Planning Commission."* (Page 2-28 Section 2.7.4) A Conditional Use Permit is being applied for as a part of this application to increase the height from 45' to 48' for limited areas of the Senior Affordable building (See Sheet 1.5). Similar to the Move Down location, the location of this height exception occurs in the middle of the site, allowing for a gradually increasing height transition from Lark and Los Gatos Boulevard. In addition to the convenient location adjacent to neighborhood serving goods and services, the senior affordable housing will offer Eden Housing's exemplary on-site resident services and the appropriate spaces to offer these services such as a plaza-level community garden, a community room, a computer center and a library or exercise room. For more detailed information on the Below Market Product, please see attached additional information specific to the BMP program.

**Below Market Product:** 60 Senior Affordable Apartments are proposed to satisfy the Town's affordable housing requirement. While these homes are all within one structure (rather than being dispersed through the application site area) they are in very close proximity to the high end move down condominium program and strategically located at the center of all community activity—Market Hall. Grosvenor and Eden Housing feel strongly that affordable housing and high-end housing can and should co-exist in close proximity to each another. Mixed-income neighborhoods are more sustainable and we believe that what is proposed is a model for long term success. In addition, the goal was

to develop a BMP program that continues to target unmet needs within the Town while achieving maximum affordability for Los Gatos seniors. The proposed location allows for immediate access to new services, and centrally locates the residents within the new community. For more detailed information on the Below Market Product, please see attached additional information specific to the BMP program.

**Senior Affordable Parking Exception:**

The parking ratio proposed for the senior affordable apartments is 0.5 spaces/unit. While the Draft Specific Plan Residential Off-Street Parking Space Requirement (Page 2-15, Table 2-1) notes 0.5 spaces + .5 guest spaces for a Senior or Affordable Housing Unit. Because these are all senior one-bedroom units, the amount of parking necessary is far less than a traditional affordable project with multiple bedrooms targeted towards a family renter. Additionally, studies consistently show that people with lower incomes typically own fewer cars than their higher income counterparts. Finally, for those seniors who do own cars at move-in it is common that over time these individuals drive less as they grow older and eventually sell their car. Eden Housing has great experience in building this type of product and consistently builds senior housing with parking ratios at or below 0.5 spaces/unit. Many of the cities in which Eden provides Affordable Senior Housing require only 0.5 spaces/unit for this product type.

**Conclusion:**

The Phase I North 40 application has thoughtfully applied the North 40 Draft Specific Plan's Vision Statement and Guiding Principles in its design. The North 40 proposes a new community that celebrates the Los Gatos lifestyle. The commercial/retail component provides much needed restaurant and retail offerings to the new neighborhood and surrounding community on the North End of Los Gatos, featuring goods and services that are appealing for Millennials and empty nesters. The residential program feeds off of this common community amenity with a mix of housing styles that target young adults, empty nesters and seniors with further affordability needs. Finally, tying all of these components together, the carefully designed open space and public realm have been inspired by the agrarian roots of the site and the Town of Los Gatos.



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August 22, 2016

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Laurel Prevetti, Town Manager  
Town of Los Gatos  
110 East Main Street  
Los Gatos, CA 95030

Re: **Issues Raised at August 16, 2016 Town Council Meeting – North Forty**

Dear Town Manager Prevetti:

This letter is written on behalf 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 August 16, 2016 Town Council meeting regarding the Project. In particular, we are responding to email correspondence from Peter Dominick dated July 13 and August 8, 2016; and to correspondence from Angelia Doerner dated August 9, August 10, and August 15, 2016. Ms. Doerner's August 9 correspondence included a presentation regarding grading presented by Jeff Eisenbaum. While we have previously provided correspondence to the Town regarding these issues, this letter consolidates those responses for the Town's convenience. The majority of these comments concern the Project's conformance with state density bonus law (Government Code §§ 65915-65918; "Density Bonus Law.")

A detailed legal analysis is attached. To summarize the conclusions of that analysis:

1. The Project is eligible for the 35 percent affordable housing bonus because over 11 percent of the units will be available at affordable rent to very low income households. Occupants of the senior units will be very low income households. (See pages 3-4 below.)
2. The Town cannot require the Applicants to calculate their density bonus based on the senior housing bonus that applies to market-rate senior housing. (See page 4 below.)
3. The density bonus was properly calculated over a base density of 237 units. (See pages 4-5 below.)

San Francisco

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Los Angeles

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San Diego

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Goldfarb & Lipman LLP

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Page 2

4. The number of applicants submitting one application for a housing development is irrelevant to the calculation of a density bonus. (See pages 5-6 below.)
5. The Project is exempt from any replacement housing obligations because the application for the Project was submitted before January 1, 2015. (See pages 6-7 below.)
6. Even though the replacement housing obligations are not applicable to the Project, it in fact complies with the replacement housing obligations contained in Government Code Section 65915(c)(3). (See pages 7-10 below.)
7. No modifications to the Town's BMP Guidelines are requested as waivers under Density Bonus Law. The Applicants were informed by the Town Attorney and Town staff that its BMP proposal is consistent with the BMP Guidelines because strict conformance would be infeasible or unreasonable, and the BMP Guidelines themselves do not require strict conformance where that is the case. The Guidelines are not valid to the extent that they are inconsistent with State law. (See pages 10-12 below.)
8. There is no evidence in the record that would justify the denial of the requested waivers. (See pages 12-15 below.)

In conclusion, the Project is eligible for the density bonus and waivers requested. Once the Project is eligible for the density bonus, there are no grounds for denying the bonus. No information is contained in the record that would allow the waiver to be denied. Hence, the Town must approve the density bonus and the proposed waivers.

Sincerely,



BARBARA E. KAUTZ

Attachments:

1. Project description dated April 30, 2014 and submitted to Town on May 12, 2014
2. AB 2556

cc: Rob Schultz, Town Attorney  
Joel Paulson, Community Development Director

## LEGAL ANALYSIS

### Issues Raised by Peter Dominick

By letter dated July 29, 2016 we previously responded to Mr. Dominick's email of July 13, 2016. Mr. Dominick has reiterated and expanded upon those issues by email dated August 8, 2016. The issues raised include the following:

Comment #1 and Comment #2 (second part): 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. For housing to be entitled to a density bonus as very low income housing, it cannot be age-restricted. As a consequence, the Project is not entitled to a density bonus for very low income housing. Any bonus must be calculated based only on the number of senior housing units.

Response: *Eligibility for Affordable Housing Bonus.* The Project is eligible for the 35 percent affordable housing bonus because over 11 percent of the units will be available at affordable rent to very low income households.

A housing development is entitled to a density bonus when the applicant agrees to construct at least "[f]ive percent of the total units...for very low income households, as defined in Section 50105 of the Health and Safety Code." (Gov't Code §65915(b)(1)B.) If a development meets this criterion, the percentage density bonus is increased to 35 percent for projects containing at least 11 percent very low income units. (Gov't Code §65915(f)(2).) "Very low income households" means "persons and families whose incomes do not exceed the qualifying limits for very low income families ...." (Health & Safety Code §50105(a).) "Total units" does not include any units added by a density bonus. (Gov't Code §65915(b)(3).)

Senior households include both "persons" (single or unrelated persons) and "families" (related persons). The Applicants have committed to the Town that the seniors who will reside in the proposed 49 units of very low income housing will be "persons and families" with very low incomes and so, by definition, will be "very low income households." Because over 11 percent of the total units in the Project are intended for "very low income households," the Project is entitled to a 35 percent density bonus.

Nothing in Density Bonus Law or in Health & Safety Code §50105 requires that affordable units be available to applicants based *solely* on income, as is contended by Mr. Dominick; the only requirement is that the affordable units be available to "very low income households." In *Wollmer v. City of Berkeley* ((2011) 193 Cal. App. 4th 1329, 1341, 1344-46), the Court of Appeal reviewed and approved a bonus of 30.7

percent for a senior affordable housing project. The bonus was based on the project's status as an *affordable* senior project, not on its status as a senior project.

As the courts have explained, Density Bonus Law "reward[s] a developer who agrees to build a certain percentage of low-income housing with the opportunity to build more residences than would otherwise be permitted by the applicable local regulations." (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal. App. 4<sup>th</sup> 807, 824 [citation omitted].) Failing to provide a bonus for *affordable* senior units would conflict with the primary purpose of Density Bonus Law, which is to provide incentives that will "contribute significantly to the economic feasibility of lower income housing." (Gov't Code §65917.)

*Applicability of Senior Density Bonus.* The Town cannot require the Applicants to calculate their density bonus based on the senior housing bonus that applies to market-rate senior housing.

Density Bonus Law provides density bonuses based on the percentage of very low, low, or moderate income housing contained in the development and separately provides a bonus for a "senior housing development." (Gov't Code §65915(b)(1)(C).) If a project elects to claim the senior housing bonus, *there is no requirement that any of the units be affordable*. Because this bonus may be claimed by even a luxury market-rate senior project, the bonus is limited to 20 percent and is calculated over the number of units in the senior housing development only. (Gov't Code §65915(f)(3).)

Density Bonus Law provides that the *applicant* shall elect whether the bonus will be based on the percentage of affordable units or on the number of senior units. The only limitation is that the applicant cannot claim both bonuses. (Gov't Code §65915(b)(2).) In this case, the Applicants have elected to calculate the bonus based on the status of the Project as a housing development containing 11 percent of the total units for very low income households. The Town has no authority to require the Applicants to calculate the bonus based only on the number of senior units.

Comment #2 (first part): 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 density bonus was properly calculated over a base density of 237 units.

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" (or base 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).)

Once base density is known, the maximum allowed bonus is “calculated,” according to the tables included in Section 65915(f), by multiplying that base density by the appropriate percentage in that section. For a project with 11 percent or more very low income units, the maximum bonus is obtained by multiplying the “maximum allowable residential density” by 35 percent.

Both the Town’s land use element of the general plan, as amended by the Town Council on June 17, 2015, and the Specific Plan, which acts as the zoning for the site, state that the maximum capacity of the North Forty site is 270 units. There are approximately 17-19 existing units within the North Forty that are not included in the Project. Consequently, the Applicants could have claimed 251-253 units as the base density and proposed a project of 339-342 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: The number of applicants submitting one application for a housing development is irrelevant to the calculation of a density bonus.

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:

" 'Housing development,' as used in this section, means a development project for five or more 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 lower income households are located." (Section 65915(i).)

The Project is a development project for more than five residential units. The Project includes residential units located on contiguous sites that are the subject of one development application. Only one tentative subdivision map has been submitted for the entire Project. As required by this section, the bonus has been calculated by including all of the residential units that are the subject of the same development application. The fact that the single development application is submitted by more than one entity, who are together the "applicant," is irrelevant in calculating the density bonus.

**Issues Raised by Angelia Doerner**

Comment No. 1: The replacement housing obligations contained in Government Code Section 65915(c)(3) are applicable to the Project.

Response: The Project is exempt from any replacement housing obligations because the application for the Project was submitted before January 1, 2015.

The relevant provision of Density Bonus Law states:

“Paragraph (3) of subdivision (c) [the replacement housing provision] 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.”

There is no doubt that the application for the Project was submitted to, and processed by, the Town before January 1, 2015. The applicants submitted Architecture and Site Application S-13-090 and Vesting Tentative Map M-13-014 to the Town on November 14, 2013. The Town then commenced processing the application, requesting more information to complete the application on December 18, 2013. The applicants continued revising the application in response to staff comments and changes in the Specific Plan until the application was deemed complete in spring 2016. While changes were made to comply with the Specific Plan adopted in June 2015, the Project now deemed complete was substantially similar to that originally submitted: 320 units v. 335 units originally submitted; 50 affordable senior units v. 60 units originally submitted; and unchanged 66,000 sf of commercial space. The density of the project has never increased from that submitted in 2013 – in fact the density has decreased. As early as April 2014, the Project description submitted to the Town contained requests for height exceptions that are very similar to the waiver requests now proposed. (See attached project description.)

Although the Town reviewed the density bonus and waiver requests in detail, it never requested information regarding the existing units on the site, in apparent agreement that the replacement housing obligation is not applicable to the Project. For instance, the Town asked for additional information regarding the senior units by letter dated November 11, 2015 and in March 2016 requested additional justification for the

requested waivers. The Town deemed the Project 'complete' after requesting no information about the existing units.

However, it has been asserted that the relevant date for determining whether a project is subject to the replacement housing provision is the date that a formal request for a density bonus was submitted, not the date that the application for the Project was submitted.

This is not correct. The relevant date is the date the application for the Project was submitted. The statute uses two different terms, "applicant" and "seeking," which are significant for understanding whether the term "application" refers to the application for the Project or the application for the density bonus. When the Applicants first submitted the application for the Project, they became an "applicant" within the meaning of the statute. The term "application" therefore is better interpreted as referring to the date of the initial application for the Project (at which time the Applicants became an "applicant" within the meaning of the statute); after which, the Applicants "sought" ("the applicant seeking") a density bonus.

In summary, the Project is not subject to the replacement housing provisions contained in Government Code Section 65915(c)(3) because the application for the Project was submitted before January 1, 2015.

Comment No. 2: The Project does not comply with the replacement housing obligations contained in Government Code Section 65915(c)(3).

Response: Although the replacement housing obligations are not applicable to the Project, it in fact complies with the replacement housing obligations contained in Government Code Section 65915(c)(3).

The replacement housing requirements relevant to the Project and contained in Density Bonus Law provide as follows:

(A) An applicant shall be ineligible for a density bonus or any other incentives or concessions under this section if the housing development is proposed on any property that includes a parcel or parcels on which rental dwelling units are or, if the dwelling units have been vacated or demolished in the five-year period preceding the application, have been . . . occupied by lower or very low income households, unless the proposed housing development replaces those units, and either of the following applies:

(i) The proposed housing development, inclusive of the units replaced pursuant to this paragraph, contains affordable units at the percentages set forth in subdivision (b).

(ii) Each unit in the development, exclusive of a manager's unit or units, is affordable to, and occupied by, either a lower or very low income household.

(B) For the purposes of this paragraph, "replace" shall mean ... the following:

(i) If any dwelling units described in subparagraph (A) are occupied on the date of application, the proposed housing development shall provide at least the same number of units of equivalent size or type, or both, to be made available at affordable rent or affordable housing cost to, and occupied by, persons and families in the same or lower income category as those households in occupancy. For unoccupied dwelling units described in subparagraph (A) in a development with occupied units, the proposed housing development shall provide units of equivalent size or type, or both, to be made available at affordable rent or affordable housing cost to, and occupied by, persons and families in the same or lower income category in the same proportion of affordability as the occupied units. All replacement calculations resulting in fractional units shall be rounded up to the next whole number. If the replacement units will be rental dwelling units, these units shall be subject to a recorded affordability restriction for at least 55 years. If the proposed development is for-sale units, the units replaced shall be subject to paragraph (2). (§ 65915(c)(3).)

If a project is subject to this provision, it must:

1. Determine the number of *rental* units occupied by low and very low income households and apply the same proportion of low-income tenants to any vacant units. (The statute does not apply to owner-occupied housing.)
2. Include the same number of replacement units of "equivalent size or type, or both," to be occupied by persons and families in the same or lower income category as those households in occupancy. If the replacement units are rentals, they must be made available at affordable rent for 55 years.
3. Verify that enough affordable units are provided in the project, *including* any replacement units, to qualify the project for a density bonus.

All Rental Units Replaced. The Project contains more than twice as many affordable units as required to replace all of the rental units existing on the site.

The Applicants have completed a recent survey and determined that there are 20 units on the site. One has been used for storage for over 10 years and therefore is not subject to any replacement housing requirements. A second unit was owner-occupied before being purchased by the Applicants and has not been leased since. This leaves 18 units that may have been available for rent in the last five years.

Even if *every* potential rental unit is occupied by a very low income person, the Project contains many more units to be occupied by “persons and families” in the same or lower income category than required to meet any replacement housing obligation. While there are 18 potential rental units existing on the site, the Project will provide 49 units that will be occupied by “persons and families” in the very low income category, over twice as many units as exist today. As discussed in the response to Comments #1 and #2 above, residents of senior housing are “persons and families.” There is no requirement that the replacement housing be available to all ages.

There is also no requirement that the replacement units be provided in *addition to* the units otherwise required to qualify the Project for a density bonus or required by the Town’s BMP program.

Under Density Bonus Law, any required replacement units are not added to the 27 units required for the Project to obtain the maximum 35 percent density bonus. The statute (§65915(c)(3)(A)(i)) provides that a development remains eligible for a density bonus if, “**inclusive** of the units being replaced, [it] contains affordable units at the percentages set forth in subdivision (b).” (Subdivision (b) sets forth the percentages required to obtain a density bonus.) The provision of only 27 very low income units would both satisfy the replacement housing requirements *and* entitle the Project to a 35 percent density bonus.

The Town’s BMP Guidelines do not include a replacement housing requirement and do not provide that any replacement requirement is added to the units otherwise required by the BMP program.

“Equivalent” Size or Type. The affordable units are of “equivalent” size and type.

Density Bonus Law as currently adopted provides no guidance as to the meaning of “equivalent size or type.” Currently before the State Senate is AB2556, a ‘clean up’ bill to clarify the replacement housing provisions (see attached copy). The bill provides that “ ‘equivalent size’ means that the replacement units contain at least the same total number of bedrooms as the units being replaced.”

The affordable senior units contained in the Project meet the standard in AB2556: they provide more total bedrooms than do the existing 18 potential rental units: 49 bedrooms will be provided, while 39 exist. The senior units also substantially exceed the aggregate size of the 18 potential rental units. The senior affordable units themselves (not including corridors, community rooms, or other space included in the building but not included in individual units) total 28,520 sf, while the existing units total 17,102 sf. The senior units substantially exceed the size of the existing units.

In conclusion, although the replacement housing provisions are not applicable to the Project, the Project in fact provides replacement affordable housing conforming to Density Bonus Law even if it is assumed that all of the rental units are occupied by lower income households.

Comment No. 3: The proposed “waivers” to the Town’s BMP Guidelines are not justified under Density Bonus Law.

Response: No modifications to the Town’s BMP Guidelines are requested as waivers under Density Bonus Law. The Applicants were informed by the Town Attorney and Town staff that its BMP proposal is consistent with the BMP Guidelines because strict conformance would be infeasible or unreasonable, and the BMP Guidelines themselves do not require strict conformance where that is the case. The Guidelines are not valid to the extent that they are inconsistent with State law.

The proposed BMP program was described in our letter of October 21, 2015 and attached BMP program. We repeat and amplify that discussion here.

- ***Type of Units, Rental vs For-Sale:*** The BMP Program requires that the “BMP units within a project that contains both rental and owner-occupied units shall also be designated as both rental and as units for purchase, in a ratio similar to that of the market-rate units.” The affordable units in the Project consist of rental housing rather than a mix of for-sale units and rentals.

***Justification:*** The Town’s requirement that BMP units in for-sale projects must also be for-sale units is invalid because it conflicts with State law. Under a provision of State housing element law, the Town cannot require that the Project provide for-sale BMP units rather than rental BMP units. Rather, Government Code Section 65589.8 provides that if a local government adopts a requirement in its housing element that developments contain a percentage of affordable units, as Los Gatos has done, the local government shall permit a developer to satisfy that requirement by constructing rental housing at affordable monthly rents. This is precisely what is being proposed here: The Town requires that new developments contain a percentage of affordable units, and the developer proposes to satisfy the Town’s BMP requirements by constructing rental housing at affordable monthly rents. The Project is therefore entitled to use rental affordable units to satisfy the BMP Program’s requirement that 20 percent of units be affordable.

A requirement that the senior affordable units be offered for sale would also make the project infeasible because of its proposed tax credit financing, which will not fund for-sale units. State law does not allow a condition to be imposed that renders a project infeasible because of its method of financing. (Gov’t Code Sections 65008(b)(2), (b)(3).)

- **Location of Units:** The BMP Program requires that the “BMP units shall be dispersed throughout the development, to the extent feasible, in all buildings, on each floor, and in each project phase.” (emphasis added) In this case, the Project includes a single affordable senior housing component which is located on the air rights above the Market Hall. The Town’s requirement would make senior housing infeasible and would physically preclude its development.

**Justification.** The affordable units in the development are proposed as senior housing. Under State law, for new housing to be limited to seniors, it must include specific design features such as doors and hallways accessible by wheelchairs, grab bars and railing for those who have difficulty walking, additional lighting in common areas, and access provided without the use of stairs, and must be designed to encourage social contact by providing at least one common room and common open space. (Civil Code § Section 51.2(d)). All senior housing must have rules and covenants clearly restricting occupancy consistent with federal and state occupancy requirements and must verify occupancy by reliable surveys and affidavits. (42 U.S.C. § Section 3607(b)(2); Civil Code § 51.3(c).) The policies, procedures, and marketing must demonstrate that the senior development as a whole is intended for seniors. (54 Fed. Reg. 3255 (Jan. 23, 1989)).

These requirements do not allow housing intended for seniors to be dispersed throughout a development or to be integrated into other buildings in the development. In a development that includes both senior and non-senior housing, as is proposed here, the senior units must be clearly separated from non-senior housing, preferably in a building where the residences are designed for seniors only, with separate entrances and facilities.<sup>1</sup> Clearly these requirements cannot be met if the senior affordable units are dispersed throughout the development.

Consequently, requiring the affordable units to be dispersed throughout the development in all buildings and on each floor would make the proposed affordable senior housing infeasible, violate State and federal fair housing laws, and physically preclude the development of the housing. Because the BMP Guidelines require dispersion of the units only if feasible, the proposal conforms with the Guidelines. (This modification was originally requested as a density bonus waiver. However, the Applicants were informed by the Town Attorney and Town staff that the Guidelines did not require dispersal of units where infeasible. As noted, dispersal would violate fair housing laws.)

- **Size of Units:** The BMP Program requires that the “size and design of BMP dwelling units shall be reasonably consistent with the market rate units in the project.” (emphasis added)

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<sup>1</sup> See Corporation for Supportive Housing, *Between the Lines: A Question and Answer Guide on Legal Issues in Supportive Housing* (2010 California Edition), at 45.

**Justification.** Because the proposed BMP units are designated for seniors, they are necessarily smaller than the market-rate units; it would not be reasonable to expect seniors to maintain units as large as the market-rate units, nor could units so large be affordable to very low income households. The expected financing sources will not provide subsidies large enough to support very low income senior units as large as the market-rate units. As noted, State law does not allow a condition to be imposed that renders a project infeasible because of its method of financing. (Gov't Code Sections 65008(b)(2), (b)(3).) Considering the intended age of the occupants and financing, the size of the BMP units is reasonably consistent with the market rate units, and the proposal conforms with the Guidelines.

The exterior design of the affordable units is fully consistent with and integrated into the design of the project as a whole and the Market Hall, in particular.

In conclusion, the proposed affordable housing does not require "waivers" from the Town's BMP Guidelines. The Guidelines themselves allow modifications where their requirements are not feasible or reasonable; and in any event they cannot be enforced to the extent that they are inconsistent with State or federal law. Since strict compliance would be inconsistent with state housing element law and with state and federal fair housing laws and would make the financing infeasible, the proposal does not require any waivers from the Guidelines.

Comment No. 4: The Project is not entitled to a density bonus for very low income housing because the affordable units are limited to seniors.

Response: Please see detailed responses to Mr. Dominick's comments #1 and #2 above.

Comment No. 5: The proposed fill of one to five feet is not required; hence, the Project does not require the requested height waiver, since the Project may be constructed without fill on existing grade.

Response: There is no evidence in the record that would justify the denial of the requested waivers. No evidence has been submitted demonstrating that the fill is not required. At the Town Council meeting of August 11, 2016, the project engineer provided extensive testimony explaining in detail the need for the project grading. The Town's Public Works Director testified at the same meeting that he could not determine if fill had been increased beyond that required to meet ADA and stormwater standards. Similarly, no evidence has been submitted to demonstrate that the permitted density of development can be achieved without the requested waivers, or that any of the required findings for denial can be made. The Town must therefore grant the waivers.

Under Density Bonus Law, the Project would have been able to request unlimited waivers of the Specific Plan's development standards including, but not limited to, height, setback, open space, floor area ratio, lot area coverage, and parking. However,

as the Applicants testified on August 11, their goal in Project design was to maximize compliance with the many objective standards in the Specific Plan. This was achieved by providing the proposed one to five feet of fill. For instance, fill was required to provide ADA-compliant access from the senior affordable building along Neighborhood Street to the VTA bus stop on Los Gatos Boulevard.

The project team was very successful in meeting the Specific Plan standards, even with a 35 percent density bonus. On this large and complicated project, with often conflicting policies, the designers were able to obviate the need for all but two waivers. As described in detail in our letter of October 14, 2015 and expanded upon in our letters of March 10 and March 25, 2016, the team cannot achieve the density of 320 units unless waivers are granted to allow height to be measured from finish grade, rather than existing grade; and to allow the elevator and roof pitch for the senior building.

Our letter of March 25, 2016, in particular, describes in some detail the limited legal basis for, denial of waivers. We repeat that discussion here.

*As described in our March 10 letter, this limited fill is required because of the need to provide ADA accessibility, meet requirements for stormwater quality, provide adequate flood control, balance cuts and fills to the extent feasible, and conform to existing boundary conditions.*

*As a consequence, three-story units cannot be constructed in these areas of fill and meet the 35-foot height limit if height is measured from existing grade (effectively reducing the permitted height by 0.1 to 5 feet). A third story, even if measured from finish grade, can barely be accommodated within the 35-foot height limit and is not possible if the height is measured from existing grade. Because 75 percent of the units have three stories, we estimate that 97 units will be lost if the heights are reduced to two stories, "physically precluding" a project with the 320 units that the project is entitled to.*

**Conformance with the Specific Plan.** *Limiting most building heights to two stories would be inconsistent with the Specific Plan's design guidelines and require further requests for waivers from those provisions. The Specific Plan contemplates a mix of two and three story residences in the North Forty. Specifically:*

- *Policy LU10 calls for a mix of residential product types.*
- *Section 2.5.2(a)(ii) requires a minimum of 15 percent of the units to have two stories, with most located in the Perimeter Overlay zone, but this clearly contemplates that most residences will have three stories.*
- *Section 2.7.3 specifies that the residential units shall range in size and states that it should accommodate a mix of residential product types to create the character of an authentic neighborhood. The illustrative example of unit size*

*mix included in the glossary shows units sizes ranging from 1,000 to 2,350 sq. ft. for the market-rate units.*

- *Sections 3.3.6(b), (c) and (d) require a variety of building forms and variations in height and roof shape. Section (h) discusses adding variety to second and third floors.*
- *Many of the graphic examples provided of the desired building forms show buildings of three stories or more with a height of at least 35 feet measured from finish grade.*

*The project that has been submitted to the Town conforms with all of the detailed design guidelines included in the Specific Plan but cannot provide the variety and types of housing contemplated if the site cannot contain three-story buildings.*

*In Wollmer v. City of Berkeley (2011) 193 Cal.App.4<sup>th</sup> 1329, the City of Berkeley granted waivers of development standards as part of a density bonus application. In particular, Berkeley approved additional building height and reduced setbacks to accommodate certain project amenities, including an interior courtyard, a community plaza, 15-foot ceilings in the commercial space, and nine-foot ceilings in the residences. Wollmer contended that Berkeley's usual development standards did not "physically preclude" construction of the project with the density bonus because no waiver would be required if the developer removed all of the project amenities.*

*The Court rejected this argument, stating:*

*[N]othing in the statute requires the applicant to strip the project of amenities, such as an interior courtyard, that would require a waiver of development standards. Standards may be waived that physically preclude construction of a housing development meeting the requirements for a density bonus, period. The statute does not say that what must be precluded is a project with no amenities, or that amenities may not be the reason a waiver is needed. Had the City failed to grant the waiver and variances, such action would have had "the effect of physically precluding the construction of a development" meeting the criteria of density bonus law. Id at 1346-47.*

*The development proposed on the North Forty is requesting a waiver not to provide additional amenities but merely to provide the design variety and types of housing required by the Specific Plan. Failure to grant this waiver would have the effect of "physically precluding" the development required by the Town's own Specific Plan.*

**Grounds for Denial.** *A request for a waiver cannot be denied because of aesthetic impacts. It may be denied only if it would be contrary to state or federal law, have an adverse impact on property listed in the California Register of Historic Resources, or*

*have a "specific, adverse impact, as defined in [Government Code Section 65589.5(d)(2)], upon health, safety or the physical environment." (G.C. Section 65915(e)(1).) Section 65589.5(d)(2) defines a "specific, adverse impact" as "a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete. Inconsistency with the zoning ordinance or general plan land use designation shall not constitute a specific, adverse impact upon the public health or safety." An aesthetic impact is not based on "public health or safety" standards.*

In conclusion, there is no evidence in the record that would allow the waivers to be denied.

**Conclusion.**

The Project is eligible for the density bonus and waivers requested. Once the Project is eligible for the density bonus, there are no grounds for denying the bonus. No information is contained in the record that would allow the waiver to be denied. Hence, the Town must approve the density bonus and the proposed waivers.

-----Original Message-----

From: Claudia Kenyon [<mailto:lclaudia@comcast.net>]

Sent: Wednesday, August 24, 2016 9:55 AM

To: Council

Subject: the North 40

I just watched the tape of your last meeting. Whatever your decision, I can see that it won't be arrived at lightly. Easy for us to sit back and say approve or deny according to our individual preferences, but you have to consider the town as a whole - and - I am sorry to hear - to endure bullying. I am going to restrain myself from giving my preference this time and just say, thank you for your work and may you rest content with your decision and may we honor it without mean remarks or actions.

Sincerely,  
Claudia Kenyon  
27 Cross Way  
Los Gatos