

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

**Sent:** Wednesday, July 26, 2017 4:05 PM

**To:** Marico Sayoc; Rob Rennie; Steven Leonardis; Marcia Jensen; BSpector; Laurel Prevetti; Robert Schultz; Council; [nchase@bayareanewsgroup.com](mailto:nchase@bayareanewsgroup.com)

**Subject:** North 40 (AB 2222)

Dear Mayor Sayoc and Council:

One, public sentiment is at least 2/3 against the present project.

Two, the key issue is whether there are objective standards to deny the project.

If there are solid objective standards, the people are saying deny it. If there are not such standards, approve it and move on. I have learned a lesson that allowing ample discretion in the specific plan limited the Town's ability to deny the project. More importantly, if we don't get our budget under control, we will be dependent on large projects for funding, and then the small town character that is Los Gatos will be gone. The longer we ignore this elephant in the room, the greater our dependency on large development funds. Of course, politically it is a contentious issue, and perhaps even suicidal for a political to press. And so, it appears that the snowball will get bigger and in the meantime things like a community center, senior center, Danville busing, downtown garages, more green bike lanes, a skate park, etc. don't come to

fruition. The pension obligation remains a staggering \$54M. There is a steep opportunity cost to a 42% police expenditure budget (Cupertino 11%, Saratoga approx. 27%).

Three, I would like to see "smart" traffic lights on that section of LG Blvd. (and eventually throughout the town).

Four, if we still have time, I suggest the specific plan, if it has not already happened, be amended to provide more objective standards in the next phase. I believe the people would support this action.

Five, looking ahead, perhaps a community center (senior center, youth innovation center), pool, and skate park can go into the next phase.

Six, I don't know enough to comment on the air quality issue. However, with what I understand over

200,000 cars per day pass through the 85/17 interchange, I do have concerns.

Seven, the issue of replacing the existing homes should be thoroughly vetted. See attachments below.

City of Fremont 2016

"Previously, state planning and zoning law required continued affordability for 30 years or longer of all very-low and low income units that qualified a developer for a density bonus.

Recent adoption of AB 2222 now requires continued affordability for 55 years or longer of all very-low and low income rental units. For-sale units that are affordable to very-low and low income households would continue to have a 30-year restriction. AB 2222 also requires replacement housing when an application for a density bonus is proposed on a site that has existing affordable rental housing, or previously had such housing, as specified.

"Finally, previous state planning and zoning law required a city or county to grant a density bonus or other incentives when a developer requested approval to convert apartments to a condominium project and agreed to provide a specified percentage of units for low or moderate income households. AB 2222 now prohibits a developer from receiving a density bonus unless the proposed condominium project would replace the existing affordable units (or previously existing affordable units, as specified) **with at least the same number of affordable units of equivalent size or type, or both**, and the proposed development contains affordable units according to specified percentages or consists entirely of affordable units." (emphasis added)

(JS—Required liberal construction of remedial statute requires interpreting the provision as requiring individual units of similar size, type or both.)

Copy and paste from <http://hcidla.lacity.org/AB-2222>

[Home](#) AB 2222

# AB 2222



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Learn how to apply for an Assembly Bill (AB) 2222 Determination. If you do not find what you are looking for, please contact us at (213) 808-8843 or [HCIDLA.landuse@lacity.org](mailto:HCIDLA.landuse@lacity.org).

On September 27, 2014, Governor Jerry Brown signed AB 2222 to amend sections of California's Density Bonus Law (Gov. Code §§ 65915). Major changes to the law are applicable to new density bonus developments resulting in a loss in existing affordable units or rent-stabilized units. The law aims to replace units on a one-for-one basis, and ensure rental affordability periods for 55 years.

### **AB 2222 APPLICATION INFORMATION**

The first step is to complete an application for an Affordable Unit Determination to find if you have potential affordable units. According to AB 2222, all rental dwelling units that exist at the time of application, or have been vacated or demolished in the five-year period preceding the application date shall be replaced on a one-for-one basis.

We will need tenant income information, among other items, to determine if affordable units need to be replaced. It is the responsibility of the owner to obtain all the required documentation verifying the tenant income and the project's rental and occupancy.

## HOW TO SUBMIT YOUR APPLICATIONS

Please submit your applications to:

E-MAIL: [hcidla.landuse@lacity.org](mailto:hcidla.landuse@lacity.org)

FAX: (213) 808-8854

MAIL: Los Angeles Housing + Community Investment Dept. (HCIDLA)

ATTN: Land Use Unit

1200 W. 7th Street, 8th Floor

Los Angeles, CA 90017

HAND-DELIVERED: The HCIDLA Public Counter – first floor at the address above

To speak with HCIDLA staff about your loan amendment application, please call (213) 808-8843, or 3-1-1 for TTY.

Copy and paste from [http://www.allenmatkins.com/Publications/Legal-Alerts/2014/09/02\\_09\\_2014-AB-2222-Density-Bonuses.aspx](http://www.allenmatkins.com/Publications/Legal-Alerts/2014/09/02_09_2014-AB-2222-Density-Bonuses.aspx)

### AB 2222 Restricts Use of State Density Bonus Law

On September 27, 2014, Governor Brown signed **AB 2222**, which amended sections of the State Density Bonus Law (Gov. Code §§ 65915, 65915.5 ["DBL"]). The main purpose of the bill is to require developers to replace all of a property's pre-existing affordable units in order to become eligible for the bonuses, incentives, waivers provided under the DBL. **This new requirement makes it essential for multifamily developers to fully investigate the existence of affordable units on the acquisition site before analyzing the benefits that may be derived from use of the DBL.** (emphasis added)

**The Density Bonus Law**

The purpose of the DBL, enacted in 1979, is to encourage cities and counties to offer density bonuses, incentives, and waivers to housing developments that include certain percentages of affordable units. As recognized by California courts, the Density Bonus Law rewards 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*, 154 Cal. App. 4th 807, 824 (2007).) By incentivizing developers, the DBL promotes the construction of housing for seniors and low-income families.

Basically, a city or county must grant a density bonus, concessions and incentives, prescribed parking requirements, as well as waivers of development standards upon a developer's request when the developer includes a certain percentage of affordable housing in a housing development project. (A summary of the DBL's history, procedural and substantive components, and key issues is provided in [this article](#).)

The concern among supporters of AB 2222 was that the DBL sometimes resulted in the overall reduction of affordable units if the prior project contained more affordable units than what was needed to qualify a new housing project under the DBL.

### **Key Provisions of AB 2222**

The most important component of AB 2222 is that it prohibits an applicant from receiving a density bonus (and related incentives and waivers) unless the proposed housing development or condominium project would, at a minimum, maintain the number and proportion of affordable housing units within the proposed development, including affordable dwelling units have been vacated or demolished in the five-year period preceding the application. (See new Gov. Code §§ 65915(c)(3)(A); 65915.5(g).)

AB 2222 also increases the required affordability from 30 years or longer to 55 years or longer for all affordable rental units that qualified an applicant for a density bonus, and requires replacement rental units to be subject to a recorded affordability restriction for at least 55 years. If the units that qualified an applicant for a density bonus are affordable ownership units, as opposed to rental units, they must be subject to an equity sharing model rather than a resale restriction. Under the prior law, only moderate income affordable ownership units were subject to the equity sharing model. (See new Gov. Code § 65915(c)(3)(B).)

This new law does not apply to density bonus applications submitted to, or processed by, a local government before January 1, 2015. (See new Gov. Code § 65915(c)(3)(C).)

### **Practical Considerations**

Because AB 2222 affects the ability of certain housing projects to qualify under the DBL, it is essential that developers seeking to invoke the DBL understand the status of the site's existing housing units for the prior several years. If a significant number of affordable units exist (or recently existed) on the site, then the new development must provide at least as many affordable units in order to qualify for a density bonus, even if the project would otherwise have qualified under the DBL's thresholds.

Moreover, developers must recognize that the affordability restrictions will now attach to the property for a longer period of time, which may affect the project's long-term financial return.

Finally, if a multifamily developer is at the early stages of the entitlement process, the developer should be aware of the January 1, 2015 trigger for AB 2222 and act quickly if the provisions of AB 2222 would adversely affect the project's use of the DBL.

Copy and paste from <http://www.glendaleca.gov/home/showdocument?id=32955>

## **AB 2222 (2014) allows conversion of over- density buildings when 33% affordable plus all units with low-income tenants past 5 year**

Respectfully, and grateful for your work on behalf of the town,

John

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[shepardsonlaw@me.com](mailto:shepardsonlaw@me.com)

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F: (408) 395-0112



City Hall • 200 N. Spring Street, Room • Los Angeles, CA 90012

December 17, 2014

TO: All Staff  
Other Interested Parties

FROM: Michael LoGrande   
Director of City Planning

SUBJECT: **IMPLEMENTATION OF AB 2222 – DENSITY BONUS**

On September 27, 2014, Governor Brown signed AB 2222, which amended sections of the State Density Bonus Law (Gov. Code §§ 65915). The law's major provision requires that density bonus projects resulting in a loss in existing affordable, and otherwise locally-regulated (i.e., rent-stabilized) housing units, replace those units one-for-one. It also extends the affordability period from 30 to 55 years and expands the use of equity sharing in for-sale units. Several other clarifications of existing law are also included, but they were not judged to represent a change to current City policy.

The City has received numerous questions regarding the implementation of AB 2222, particularly with respect to timing and procedures. As the City is unable to amend the local density bonus ordinance implementing State law prior to January 1, 2015 (when the law takes effect), this memo will serve as interim direction for staff and project applicants. Also please refer to the [Affordable Housing Procedures Memo and Flowchart](#) that details current procedures.

### **Replacement Units**

In order to receive a permit for a density bonus project involving a demolition or conversion, a project will need to demonstrate compliance with the housing replacement provisions of AB 2222. The Housing and Community Investment Department (HCIDLA) will be responsible for making determinations regarding replacement unit requirements. In order to make these determinations, the HCIDLA may require information about a property and its occupants for up to five years prior to the date of the request. A determination letter will be given to both the Department of City Planning (DCP) and applicant concerning the conditions that must be met. The City will require a Land Use Covenant recognizing the conditions be filed with the County prior to granting a building permit on the project.

According to AB 2222, an applicant shall replace any rental dwelling units that either exist at the time of application, or have been vacated or demolished in the five-year period preceding the application, which are or have been:

1. Subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of lower or very low income;
2. Subject to any other form of rent or price control (including the [Rent Stabilization Ordinance](#)); or
3. Occupied by lower or very low income households (i.e., income levels less than 80% of the area median income (AMI))

The replacement units must be the equivalent size or type, or both, and be made available at affordable rent/cost to, and occupied by, households in the same or lower income category as those meeting the

occupancy criteria<sup>1</sup>. As such, a low-income rental unit (affordable to someone making between 50% and 80% AMI) would be replaced by a unit affordable to someone making between 50 and 80% AMI (with rents set at 60% of AMI or below for rental units set at 80% AMI). The HCIDLA will also be responsible for verifying these requirements are met.

### **Timing**

Following January 1, 2015, all submittals will need to adhere to the new AB 2222 requirements. AB 2222 specifies that the housing replacement provisions described above do not apply if an "application was submitted to, or processed by" the City before January 1, 2015. As discussed below, the City will accept applications under the current (pre-AB 2222) provisions if an initial density bonus application to either DCP or HCIDLA has been submitted on December 31, 2014 or before. The following describes in more detail what is considered a submittal for the two major types of density bonus processes.

#### **1. Ministerial ("By-Right") Density Bonus Project:**

If the Los Angeles Department of Building and Safety (LADBS) determines a project is by-right (meaning it meets the zoning code, and does not require any on or off menu incentives) then no Planning applications are necessary. However, density bonus applicants must complete an "Application for Building Permit and Certificate of Occupancy" with LADBS. In order to be considered an application "submitted to or processed by the City", the LADBS application must be completed in its entirety with any and all required documents attached, and any and all applicable fees paid in full. Once the aforementioned requirements have been met, LADBS will issue a receipt to the applicant. The date of receipt ("Date of Receipt") will constitute the "submitted and processed" date for the purposes of the replacement housing provisions of AB 2222. HCIDLA will ensure compliance with the replacement provisions of AB 2222.

#### **2. Planning Entitlement Density Bonus Project:**

Density Bonus projects requiring discretionary review due to the need for planning/zoning entitlements from DCP are presently asked to complete an Affordable Housing Referral Form, in addition to the Master Land Use Application. The Referral Form serves as a worksheet to determine the number of required affordable units. It has been updated to include a question on replacement units. Once a complete density bonus submittal has been accepted by the DCP public counter, fees have been fully paid and a case number has been assigned, the application will be considered "submitted". The "submittal" date is also referred to as the "case filed on" date, which will be verified by staff when writing up the determination letter.

### **Affordability Covenants**

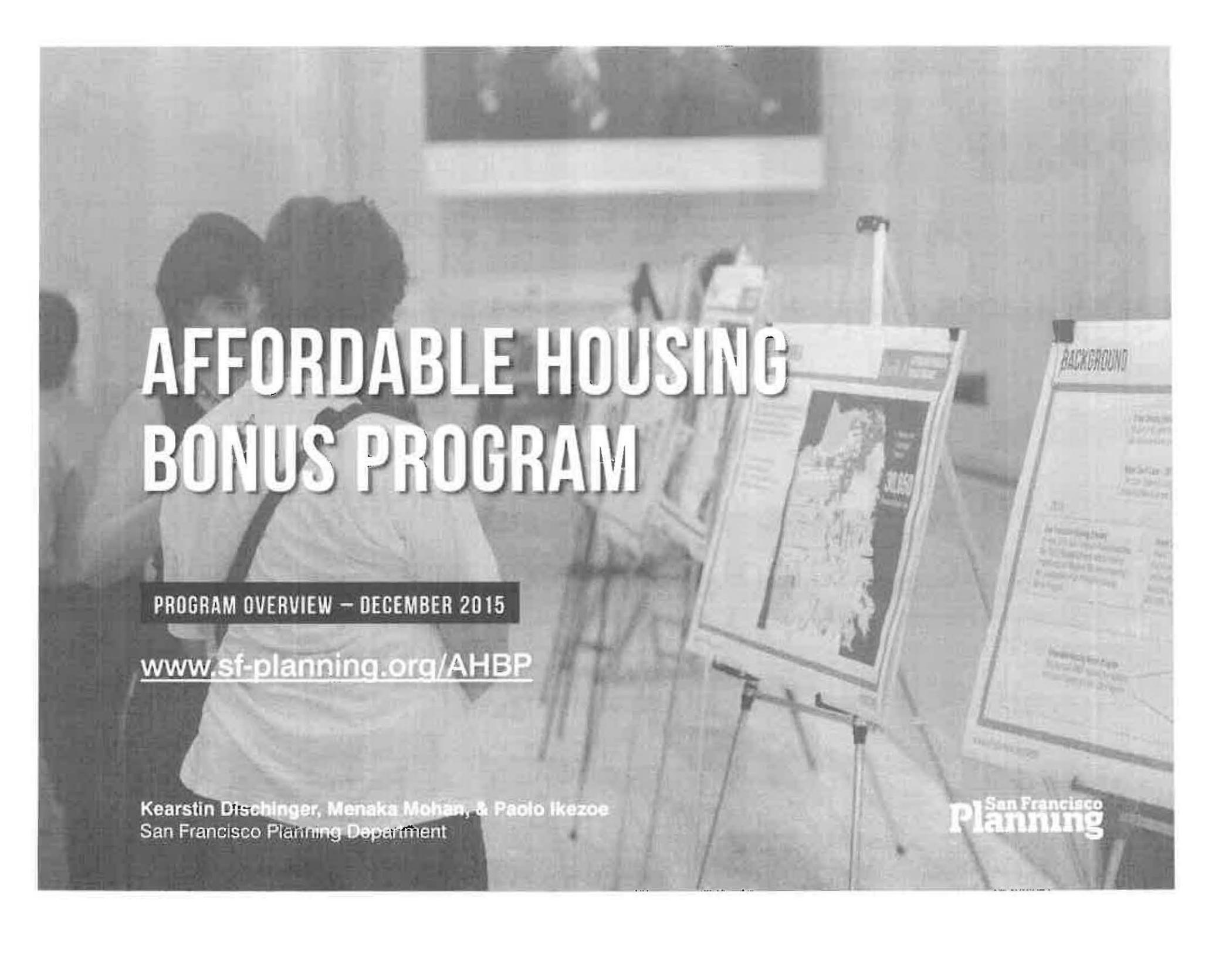
AB 2222 specifies that all affordable and replacement rental units shall be subject to a recorded affordability restriction for at least 55 years. This provision replaces the prior 30-year restriction for all projects "approved" on or after January 1, 2015. For Ministerial ("By Right") Density Bonus projects, the "approved" date is the Date of Receipt, as discussed above. For Planning Entitlement Density Bonus projects, the date a project will be considered "approved" is the date of Planning's "Director's Determination" letter for the project.

If a development is for-sale, then the initial costs shall be affordable and, upon resale, new equity sharing provisions shall apply to all affordable units, according to Paragraph 2 of Gov. Code §§ 65915. Previously equity sharing had been required only for moderate income units.

All Density Bonus projects are required to prepare and record an Affordability Covenant to the satisfaction of the HCIDLA's Environmental and Land Use Section before a building permit can be issued. To apply to HCIDLA to prepare a covenant, contact the Environmental and Land Use section at 213-808-8993 or [hcidla.landuse@lacity.org](mailto:hcidla.landuse@lacity.org)

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<sup>1</sup> The HCIDLA and Planning Department interpret this to mean the commonly understood housing-related income categories: extremely low income (30% AMI), very-low income (50%), low income ((80% AMI for a rental unit of no more than 60% AMI rent levels)) and moderate income (120%)



# AFFORDABLE HOUSING BONUS PROGRAM

PROGRAM OVERVIEW — DECEMBER 2015

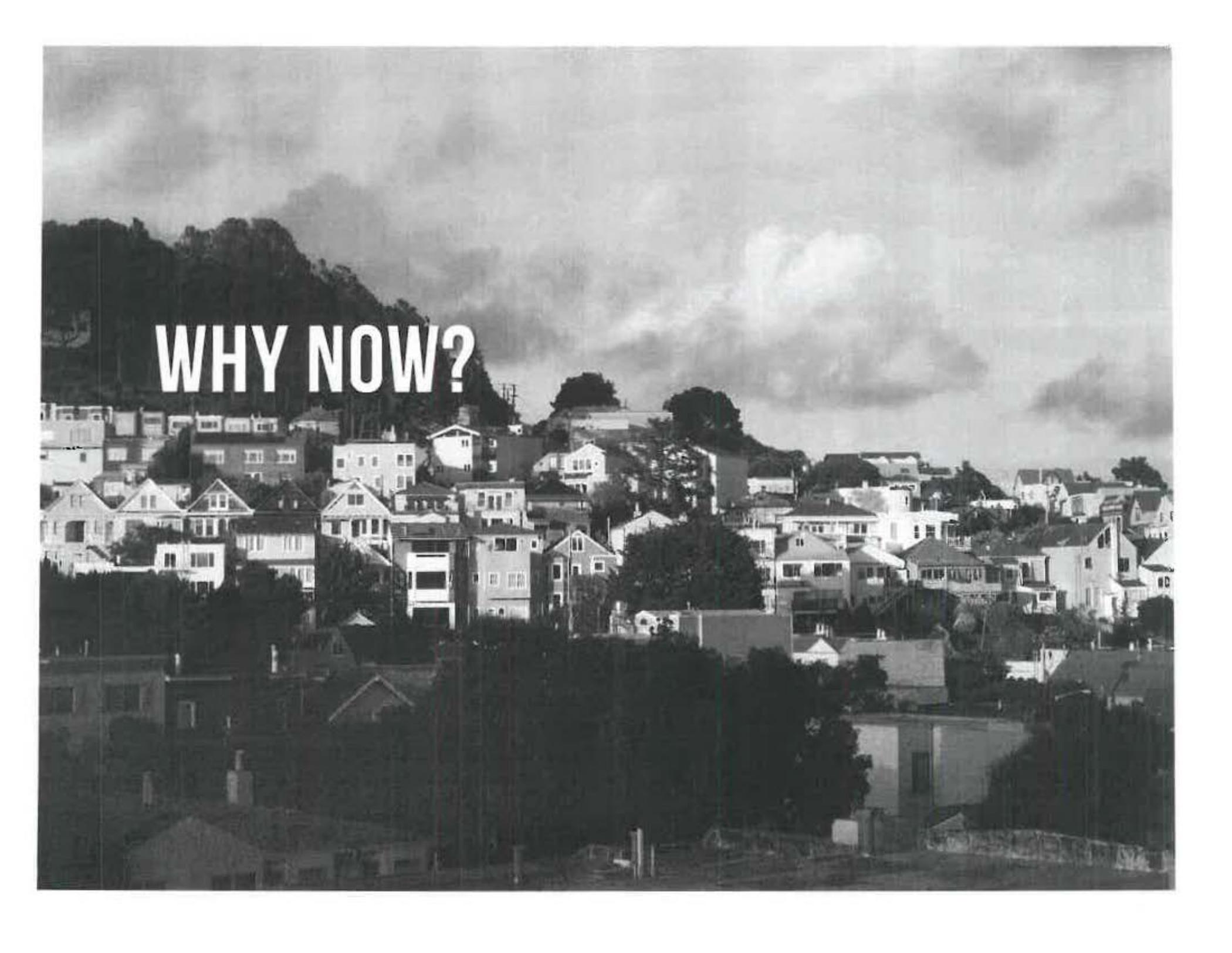
[www.sf-planning.org/AHBP](http://www.sf-planning.org/AHBP)

Kearstin Dirschinger, Menaka Mohan, & Paolo Ikezoe  
San Francisco Planning Department

San Francisco  
**Planning**

## AGENDA

- Why Now?
- Nuts and Bolts: How the Program Works
- What's 'Affordable'?
- Program Area
- What Does This Mean for Your Neighborhood?
- Next Steps and Learn More



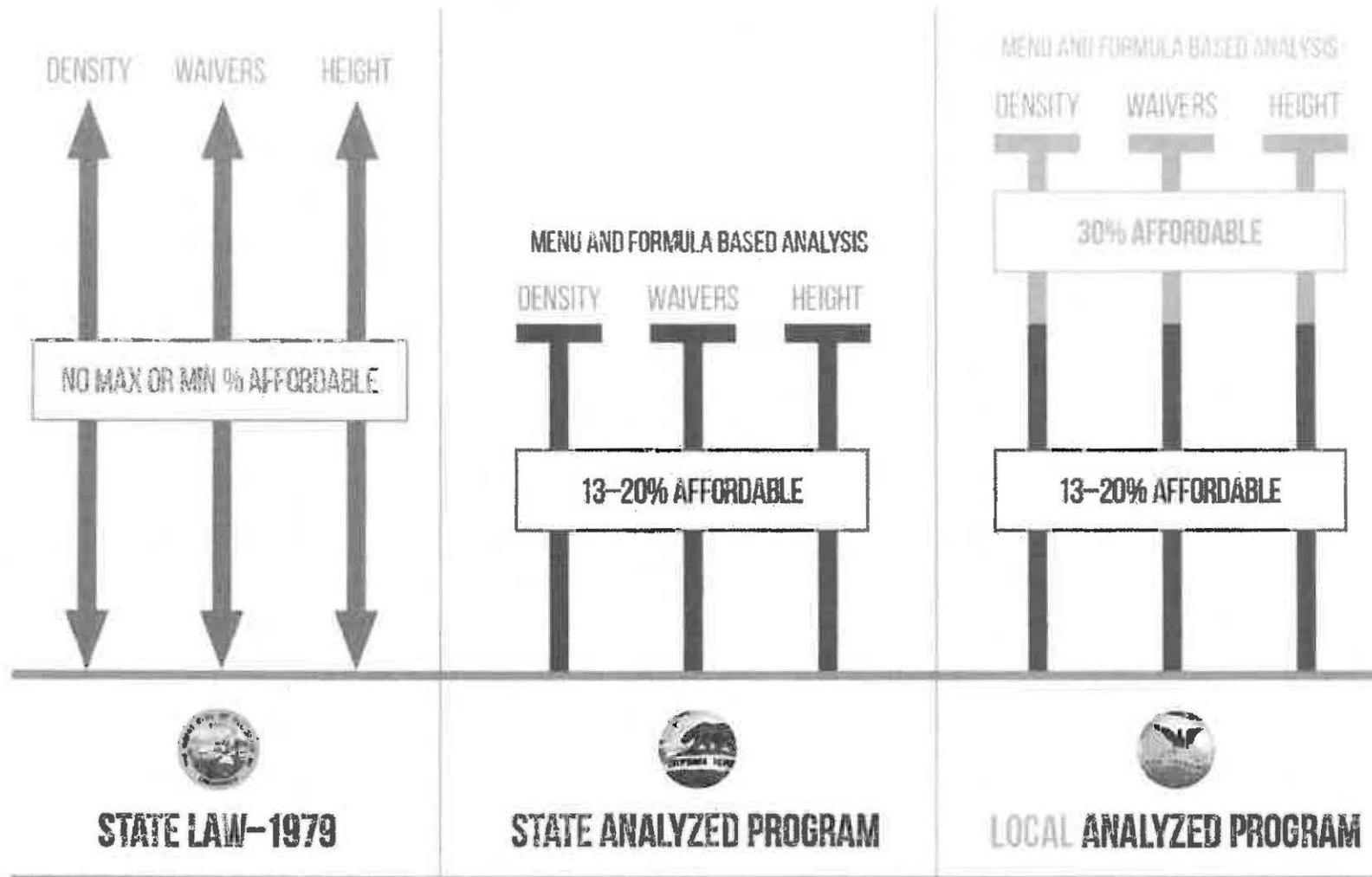
**WHY NOW?**

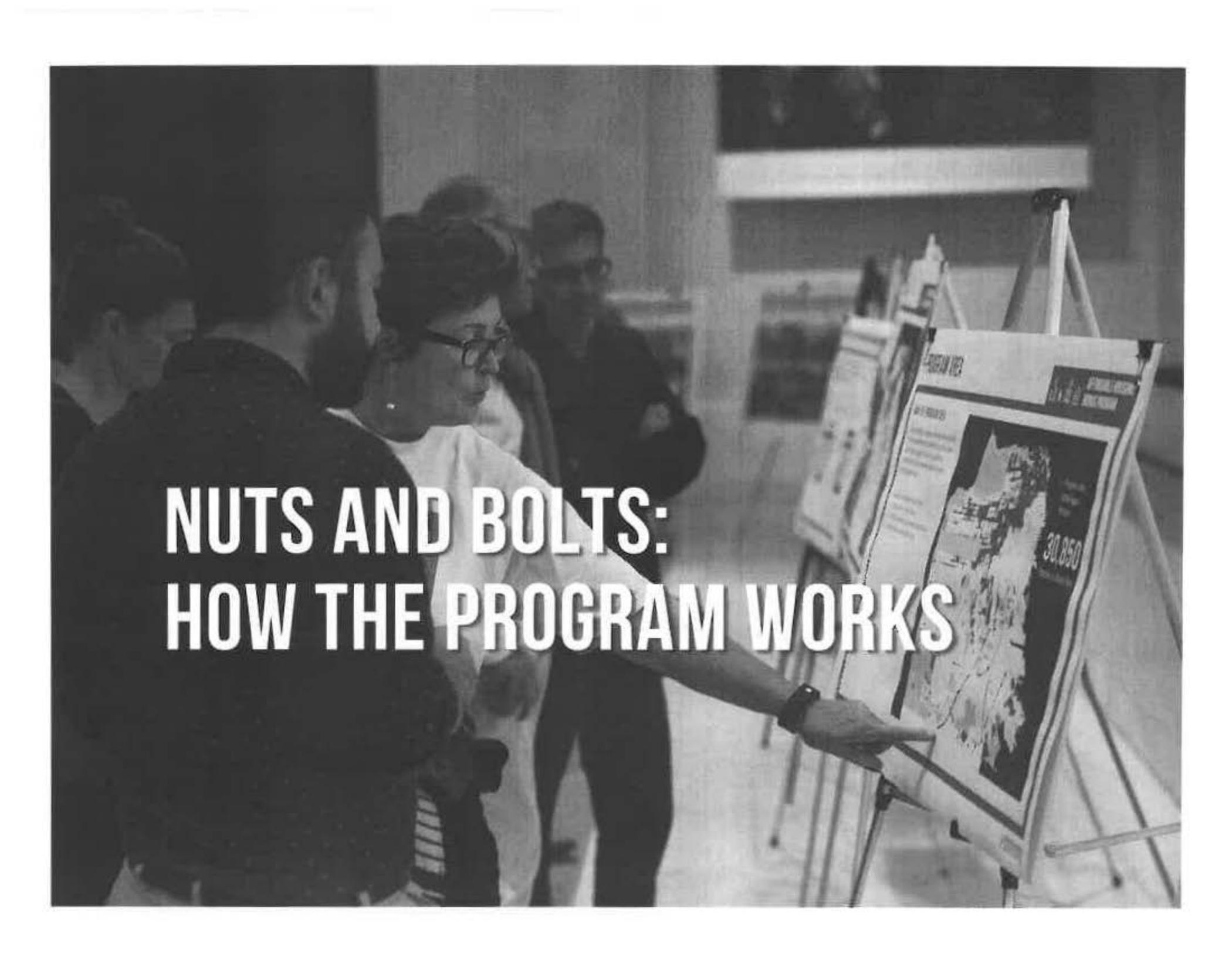
# WHY NOW?

- Complying with Mandatory State law
- Providing housing for middle-income households
- One of many tools to provide affordable housing in San Francisco



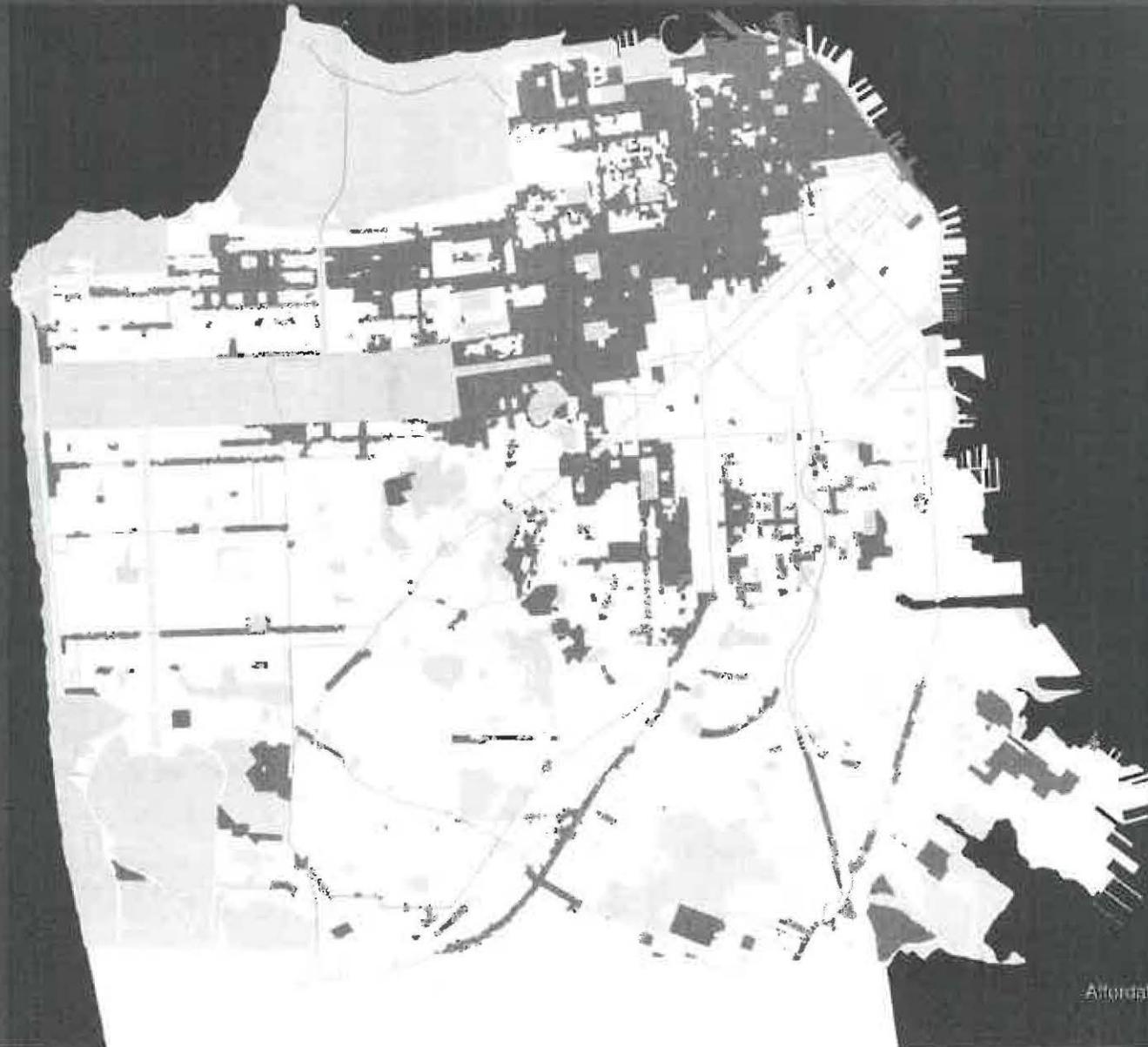
# COMPARING STATE LAW TO AHBP PROGRAMS





**NUTS AND BOLTS:  
HOW THE PROGRAM WORKS**

# PROGRAM AREA: KEY MIXED-USE AND COMMERCIAL CORRIDORS



30,500

*Parcels in  
Program Area*

 *Program  
Area*



# PROPOSED STATE AFFORDABLE HOUSING BONUS PROGRAM



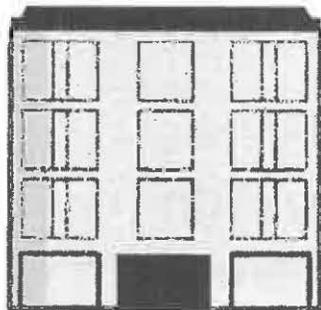
This program is referenced as the 'State Program' because it is intended to locally implement the State Density Bonus Law.

The following incentives will be available:

- Up to 2 stories above existing height limits
- 7-35% density bonus granted on a graduated scale:
  - Percent of affordable units
  - Income levels by affordable units

Market Rate Units   
  Affordable Units to Low or Moderate-Incomes   
  Affordable Units to Very Low, Low, or Moderate Incomes

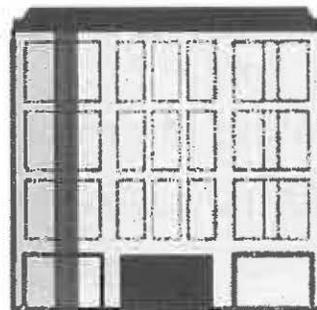
**CURRENT**



**12%**

Affordable Units to Low or Moderate-Incomes (Required)

**STATE AHBP PARTICIPANT\***

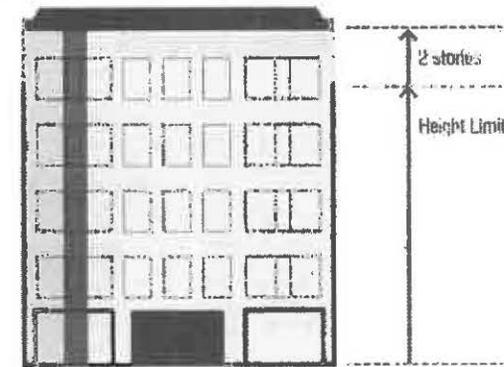


**12% + 1-8%**

Affordable Units to Low or Moderate-Incomes (Required)    Affordable Units to Very Low, Low, or Moderate Incomes

\* Project must include 5 units or more.

**DENSITY BONUS - HEIGHT INCREASE**



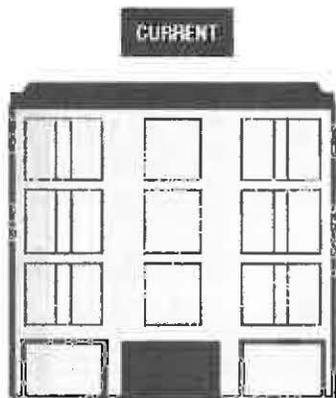
**= 13-20%**

**Affordable on-site units**

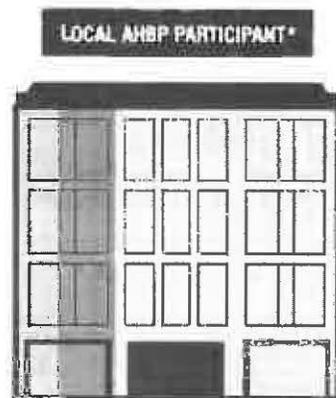
# AFFORDABLE HOUSING BONUS PROGRAM

- Projects that contain **30 percent affordable units** (18 percent for middle-income residents, 12 percent for low and moderate) will receive:
  - Up to two stories above existing height regulations
  - Increase in the total amount of housing units on-site

Market Rate Units
  Affordable Units to Low or Moderate-Incomes
  Affordable Units to Middle-Incomes

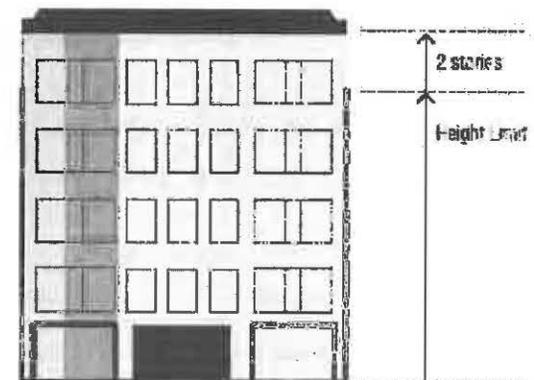


**12%**  
 Affordable Units to Low  
 or Moderate-Incomes  
 (Required)



**12% + 18%**  
 Affordable Units to Low  
 or Moderate-Incomes  
 (Required)      Affordable Units to  
 Middle-Incomes

**DENSITY BONUS - HEIGHT INCREASE**



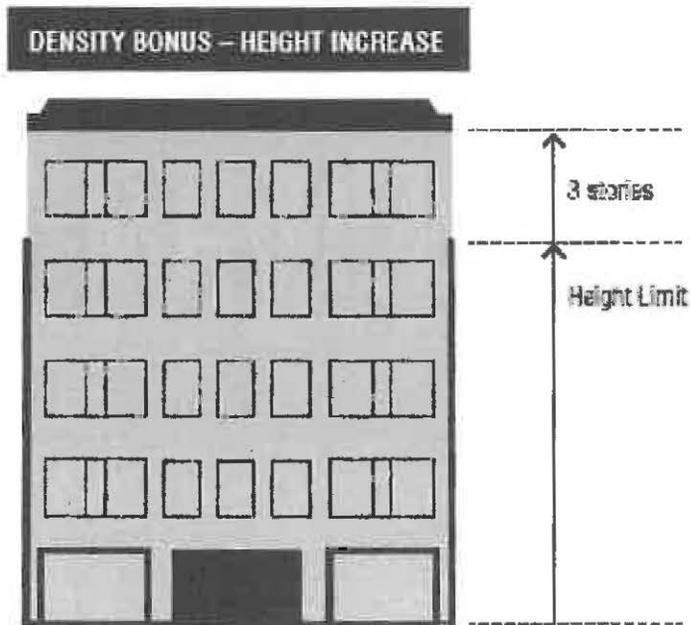
**= 30%**  
**Affordable**  
**on-site units**

\* There is no minimum unit threshold

# AFFORDABLE HOUSING BONUS PROGRAM

- Projects with **100 percent affordable units** will receive:
  - Up to three stories above existing height regulations

■ 100% Affordable Units



An aerial, black and white photograph of a city, likely Los Angeles, showing a dense urban area with a river winding through it. In the background, there are mountains. The text "WHAT'S 'AFFORDABLE'?" is overlaid in large, white, bold, sans-serif capital letters across the middle of the image.

**WHAT'S 'AFFORDABLE'?**

# WHAT IS 'AFFORDABLE'?

| Income Level    | One-Person Household Income per Year | Four-Person Household Income per Year |
|-----------------|--------------------------------------|---------------------------------------|
| Very-Low        | \$36,000                             | \$51,000                              |
| Low-income      | \$57,000                             | \$82,000                              |
| Moderate-Income | \$85,000                             | \$122,000                             |
| Middle-Income   | \$100,000                            | \$143,000                             |



**AVERAGE RENT FOR A  
ONE-BEDROOM APARTMENT  
IN SF: \$3,650\***

| <b>One-person Household</b> | <b>Affordable Monthly Rent</b> |
|-----------------------------|--------------------------------|
| Very-low income             | \$900                          |
| Low-income                  | \$1,425                        |
| Moderate-income             | \$2,125                        |
| Middle-income               | \$2,500                        |

**AVERAGE RENT FOR A  
TWO-BEDROOM APARTMENT  
IN SF: \$5,000\***

| <b>Two-three person Household</b> | <b>Affordable Monthly Rent</b> |
|-----------------------------------|--------------------------------|
| Very-low income                   | \$1,000                        |
| Low-income                        | \$1,600                        |
| Moderate-income                   | \$2,400                        |
| Middle-income                     | \$2,800                        |

\*as of 11/3/15

# AHBP PROTECTIONS ---- AB 2222

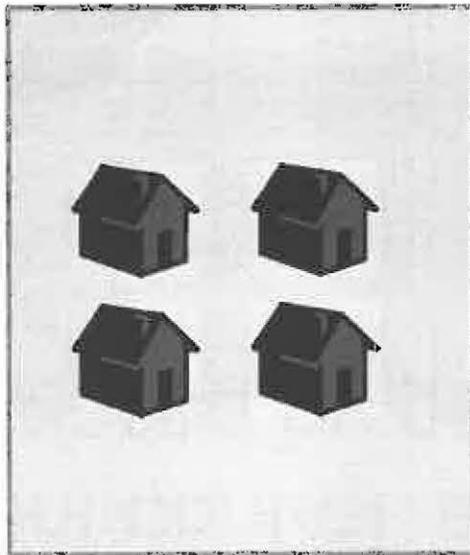
For all AHBP projects:

- Rent control and affordable units must be replaced by permanently affordable BMR units.



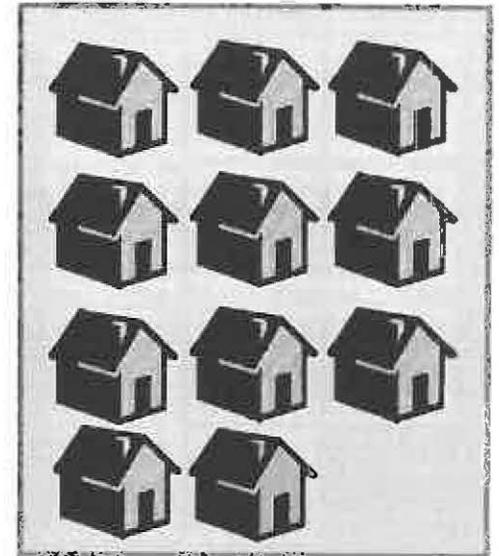
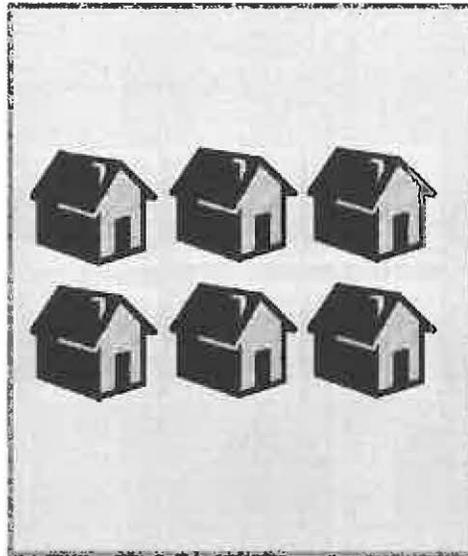
BMR - Rent Control Replacement

# AB2222 AS DRAFTED

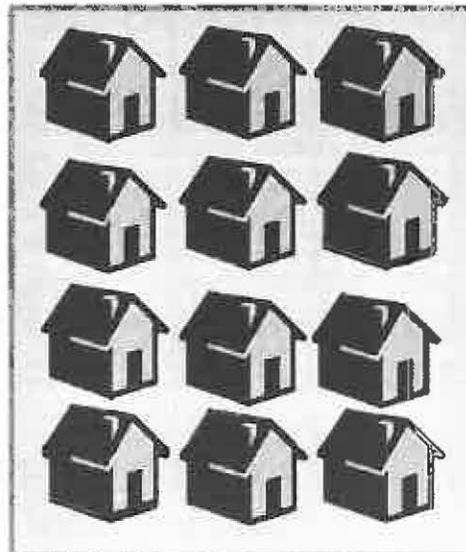


-  RENT CONTROL
-  MARKET RATE
-  BMR
-  BMR - RENT CONTROL REPLACEMENT

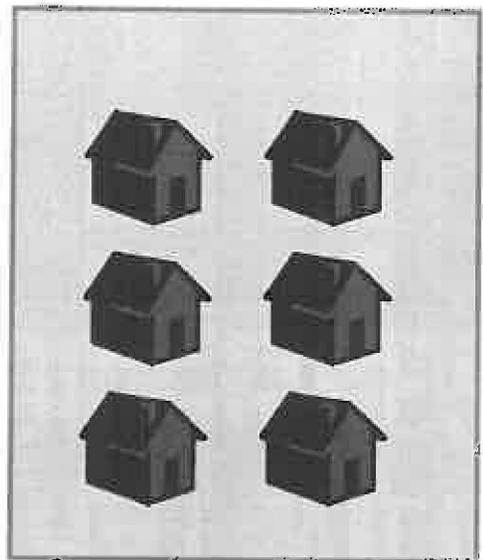
## NEW CONSTRUCTION UNDER CURRENT ZONING



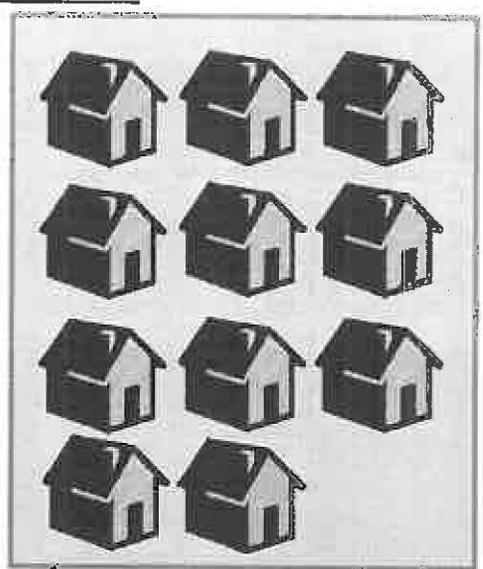
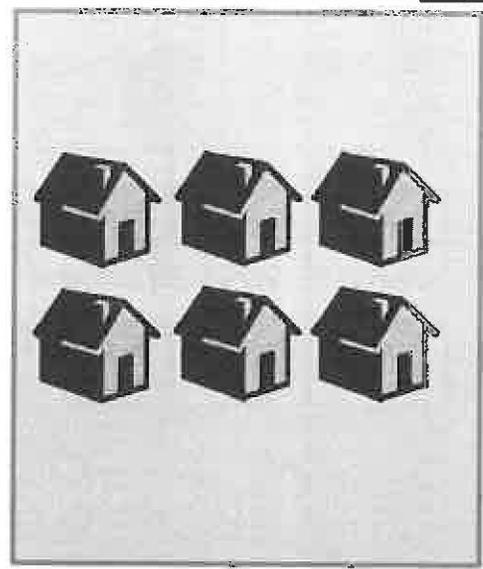
## NEW CONSTRUCTION UNDER LOCAL AHBP



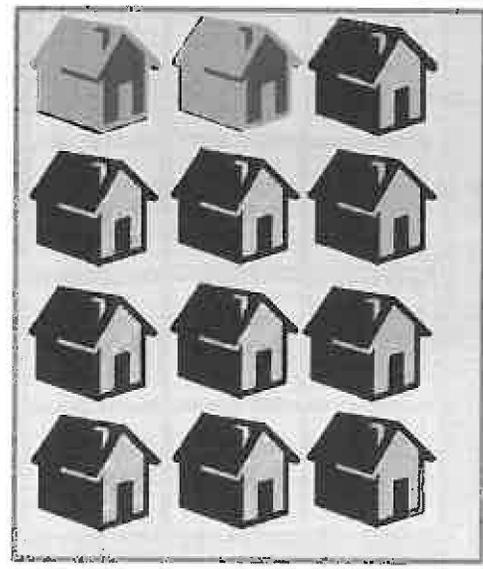
# AB2222



## NEW CONSTRUCTION UNDER CURRENT ZONING



## NEW CONSTRUCTION UNDER LOCAL AHBP



-  RENT CONTROL
-  MARKET RATE
-  BMR
-  BMR - RENT CONTROL REPLACEMENT

**WHAT WILL THIS  
LOOK LIKE?**



# SOFT SITE EXAMPLES



GEARY BLVD NEAR DIVISADERO

# SOFT SITE EXAMPLES



GEARY BLVD AT SPRUCE

# SOFT SITE EXAMPLES



2559 VAN NESS AVE - 2009

# SOFT SITE EXAMPLES



2559 VAN NESS AVE - 2015

## POSSIBLE UNDER CURRENT ZONING



Current zoning allows up to 47 homes in a 65' building.

## POSSIBLE UNDER AHBP



Under the AHBP, 65 homes could be built in a 85' building.

- MAXIMUM ALLOWED HEIGHT UNDER THE AHBP—WITH 30% AFFORDABLE HOMES
- CURRENT HEIGHT LIMIT

## POSSIBLE UNDER CURRENT ZONING



Up to 8 homes in a 40' building are allowed under current zoning.

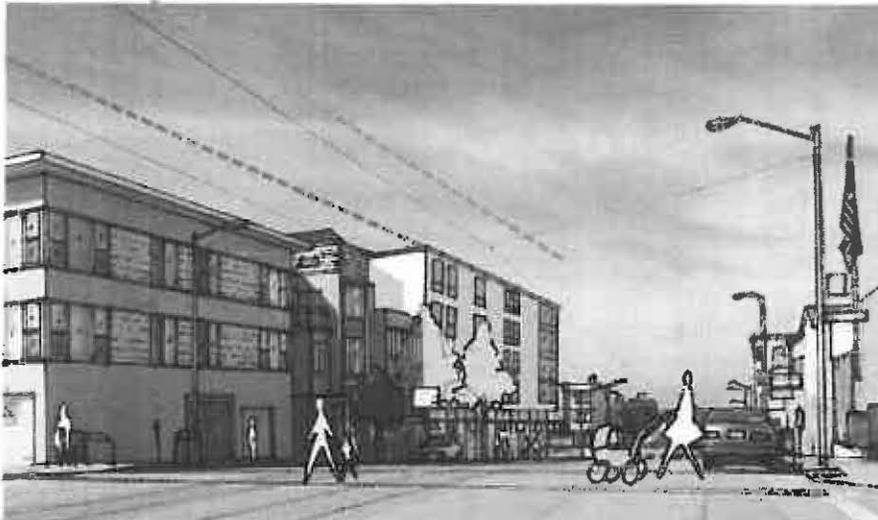
## POSSIBLE UNDER AHBP



Under the AHBP, 13 homes could be built in a 65' building.

- MAXIMUM ALLOWED HEIGHT UNDER THE AHBP—WITH 30% AFFORDABLE HOMES
- CURRENT HEIGHT LIMIT

## POSSIBLE UNDER CURRENT ZONING



Up to 15 homes in a 50' building are allowed under current zoning.

## POSSIBLE UNDER AHBP



Under the AHBP, 40 homes could be built in a 75' building.

- MAXIMUM ALLOWED HEIGHT UNDER THE AHBP—WITH 30% AFFORDABLE HOMES
- CURRENT HEIGHT LIMIT

## WHAT COULD NEW AHBP BUILDINGS LOOK LIKE?



Buildings in this area are currently allowed 40' in height, but this 1911 apartment building is about 65', similar to a new AHBP building with 35% affordable homes.

## WHAT COULD NEW AHBP BUILDINGS LOOK LIKE?



Buildings in this area are currently allowed 40' in height, but this 1913 building is about 55'.

## WHAT COULD NEW AHBP BUILDINGS LOOK LIKE?



This apartment building (circa 1928) exceeds the existing 40' height limit by at least 3 stories.

# AHBP PROJECT REVIEW PROCESS

- Process does not change for AHBP projects
- Same standards as any other project
- Community review opportunities:
  - Project development phase – Pre-Application Meeting
  - Planning Department review – Neighborhood notifications
  - Planning Commission hearing – Public comments

# NEXT STEPS AND LEARN MORE



## NEXT STEPS

- January 28<sup>th</sup> – Hearing at the Planning Commission
  - Proposed Adoption of General Plan Amendments
  - Consideration of Mayor and BOS sponsored Ordinance
- TBD – Land Use Committee Hearings
- TBD – Full Board of Supervisor Hearings
- TBD – Mayor's signature
- Implementation – Spring 2016 (projected)

# LEARN MORE

**Website** – <http://www.sf-planning.org/AHBP>

- FAQs
- Video
- Project updates via email list serve
- Interactive webinar
- Draft legislation and guidelines
- Analysis, reports and studies
- Videos, materials and follow up from previous presentations and meetings
- Existing plans and programs

## **Upcoming Meetings:**

- Community meetings  
District 5 Community Meeting – December 10, 2015
- Planning Commission meetings  
Adoption Hearing - January 28, 2016

**THANK YOU!**

**San Francisco  
Planning**

# BACKGROUND

STATE DENSITY  
BONUS LAW



**2013 Napa Court Case**

AFFORDABLE HOUSING  
PROGRAMS

**Inclusionary Housing Program  
Existing Affordable Housing Programs**

SF AFFORDABLE HOUSING  
NEEDS

**Proposition K  
Middle Income Housing**

SF PLANS AND INITIATIVES

**Mayor's Working Group  
Housing Element**

# WHY ARE WE DOING THIS?

STATE DENSITY  
BONUS LAW



2013 Napa Court Case

AFFORDABLE  
HOUSING  
BONUS PROGRAM



No Public Subsidies

Tradeoffs



SF AFFORDABLE  
HOUSING NEEDS

Mayor's Working Group  
Proposition K  
Middle Income Housing

SF PLANNING  
EFFORTS

Housing Element  
Density Bonus  
Sunset Blueprint  
Invest in Neighborhoods

OTHER HOUSING  
PROGRAMS

Inclusionary Housing Updates  
Housing Trust Fund

# AFFORDABLE HOUSING BONUS PROGRAM - POLICY GOALS



INCENTIVIZE GREATER LEVELS  
**OF ONSITE AFFORDABLE UNITS**



IMPROVE FEASIBILITY OF  
**UNDERUTILIZED SITES**

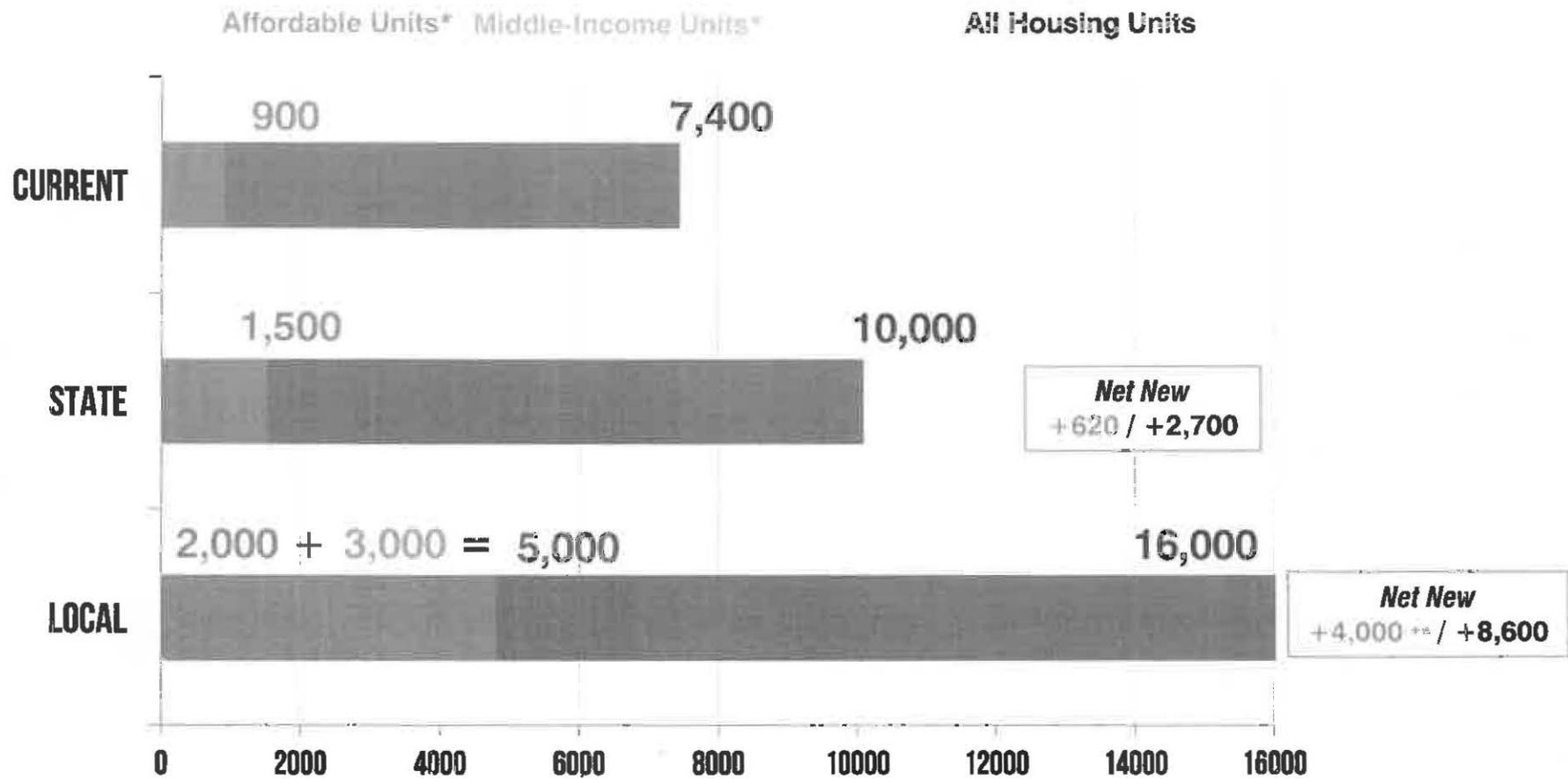


ESTABLISH A 'MIDDLE  
**INCOME' PROGRAM**



FACILITATE ENTITLEMENT OF  
**100% AFFORDABLE PROJECTS**

# PROJECTED MAXIMUM TOTAL NEW UNITS SOFT SITES IN PROGRAM AREA , 20 YEARS



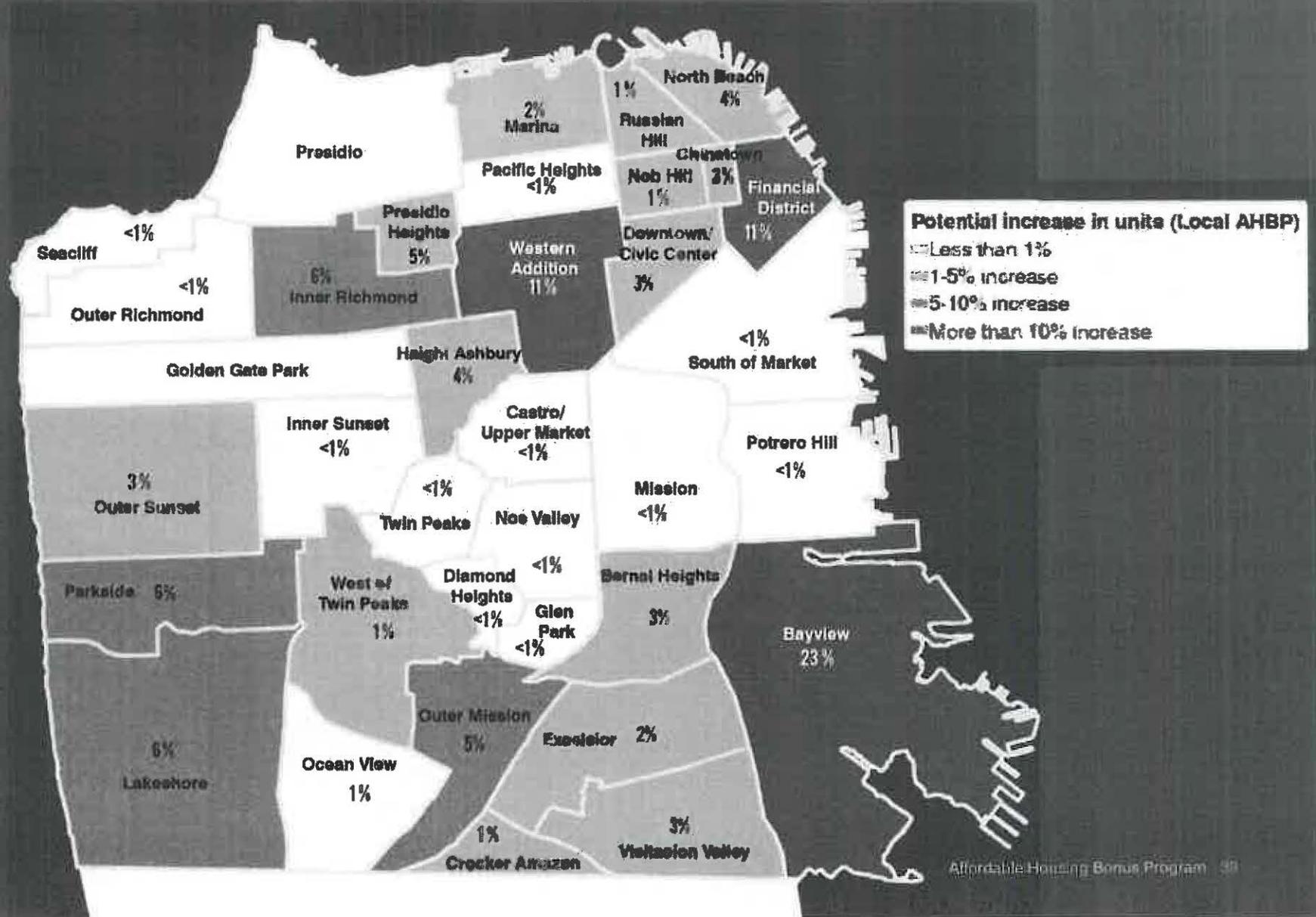
Affordable Units – permanently affordable, deed restricted housing units built by market rate developers.  
 \* Assumes all projects provide inclusionary units onsite. Does not include 100% affordable housing projects.  
 \*\* Includes some middle income units for 120% or 140% AMI.

# AHBP PROGRAM AREA: NEAR TRANSIT

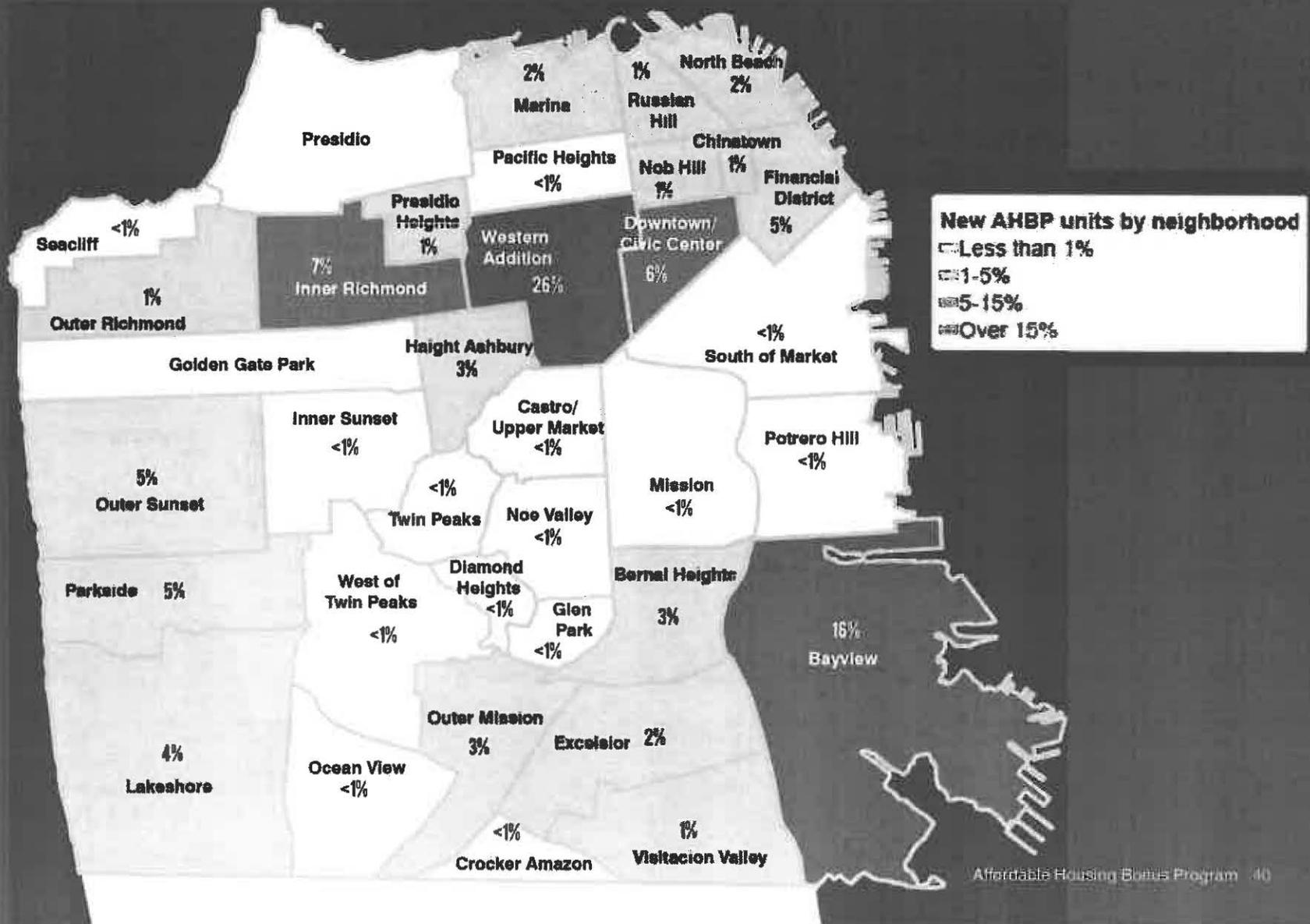


*Walking distance  
to Muni Rapid*

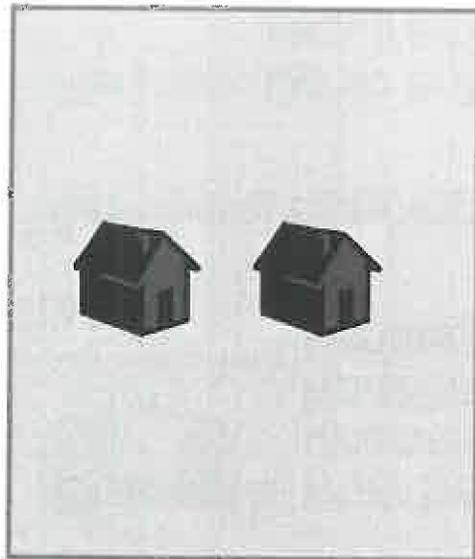
# SOFT SITES: WHERE?



# SOFT SITES: WHERE?



# EXISTING



**RENT CONTROL**

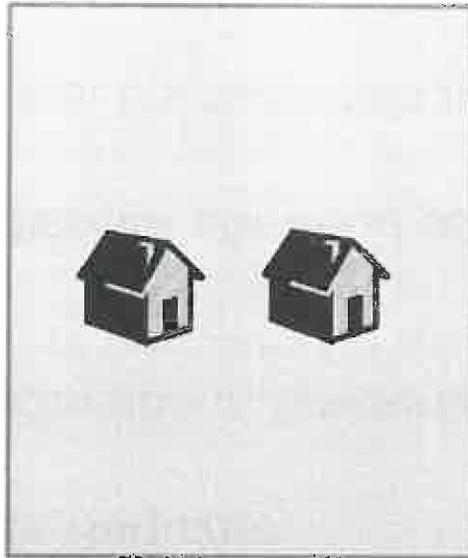


**MARKET RATE**

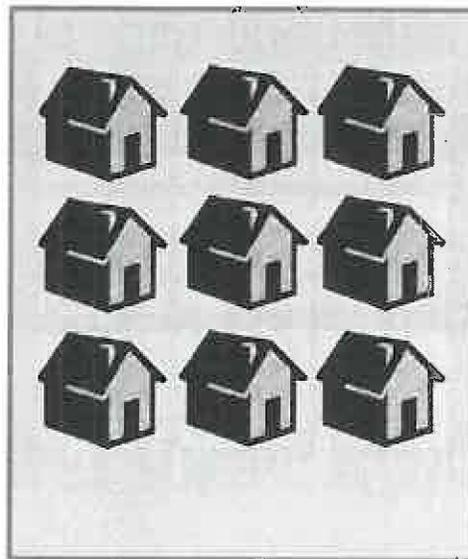


**BMR**

## CHANGE IN TENANCY (OMI, ELLIS ACT, ETC)

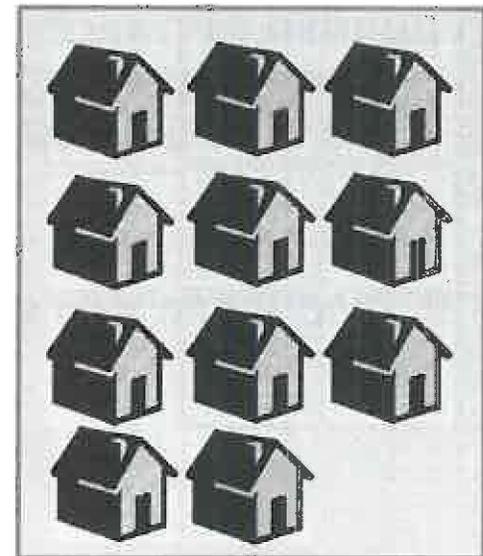


## NEW CONSTRUCTION



**(LESS THAN 10 UNITS)**

OR



**(10 UNITS OR MORE)**



## LOCAL AHBP DRAFT ZONING MODIFICATIONS-UP TO 3

**Rear Yard:** No less than 20% of the lot depth, or 15 feet whichever is greater

**Exposure:** May be satisfied through qualifying windows facing an unobstructed open area that is at least 25 feet in every horizontal and such open area is not required to expand on subsequent floors

**Off-Street Loading:** None Required

**Parking:** Up to a 75% reduction in residential and commercial requirements

**Open Space:** 5% reduction for common open space

**Open Space:** An additional 5% reduction in common open space



## 100 % AFFORDABLE AHBP DRAFT ZONING MODIFICATIONS

**Rear Yard:** No less than 20% of the lot depth, or 15 feet whichever is greater

**Exposure:** May be satisfied through qualifying windows facing an unobstructed open area that is at least 15 feet in every horizontal and such open area is not required to expand on subsequent floors

**Off-Street Loading:** None Required

**Parking:** Up to a 100% residential and commercial requirements

**Open Space:** Up to 10% reduction for common open space



## STATE AHBP DRAFT INCENTIVES AND CONCESSIONS

**Rear Yard:** No less than 20% of the lot depth, or 15 feet whichever is greater

**Exposure:** May be satisfied through qualifying windows facing an unobstructed open area that is at least 25 feet in every horizontal and such open area is not required to expand on subsequent floors

**Off-Street Loading:** None Required

**Parking:** Up to a 50% reduction in residential and commercial requirements

**Open Space:** 5% reduction for common open space

**Open Space:** An additional 5% reduction in common open space

# ENTITLEMENT OF 30% AFFORDABLE OR MORE -328

PROCESS FOR AFFORDABLE BONUS PROJECTS IS CONSISTENT WITH CURRENT PRACTICE



## ENTITLEMENT 328

PLANNING COMMISSION  
HEARING

- Modeled after LPA in Eastern Neighborhoods
- Commission Hearing-Public Input and Certainty for Developer
- Focused on Design Review and Consistency with the Affordable Housing Design Guidelines
- Findings must be completed if the project requires a Conditional Use
- Appeal to the Board of Appeals

# Serving the Continuum of Housing Needs

**MOHCD Affordable Rental**

**Up to 60% AMI**

**BMR Inclusionary Rental**

**Up to 55% AMI**

**BMR Inclusionary Ownership**

**Up to 90% AMI**

**Down Payment Assistance Loan Program (DALP)**

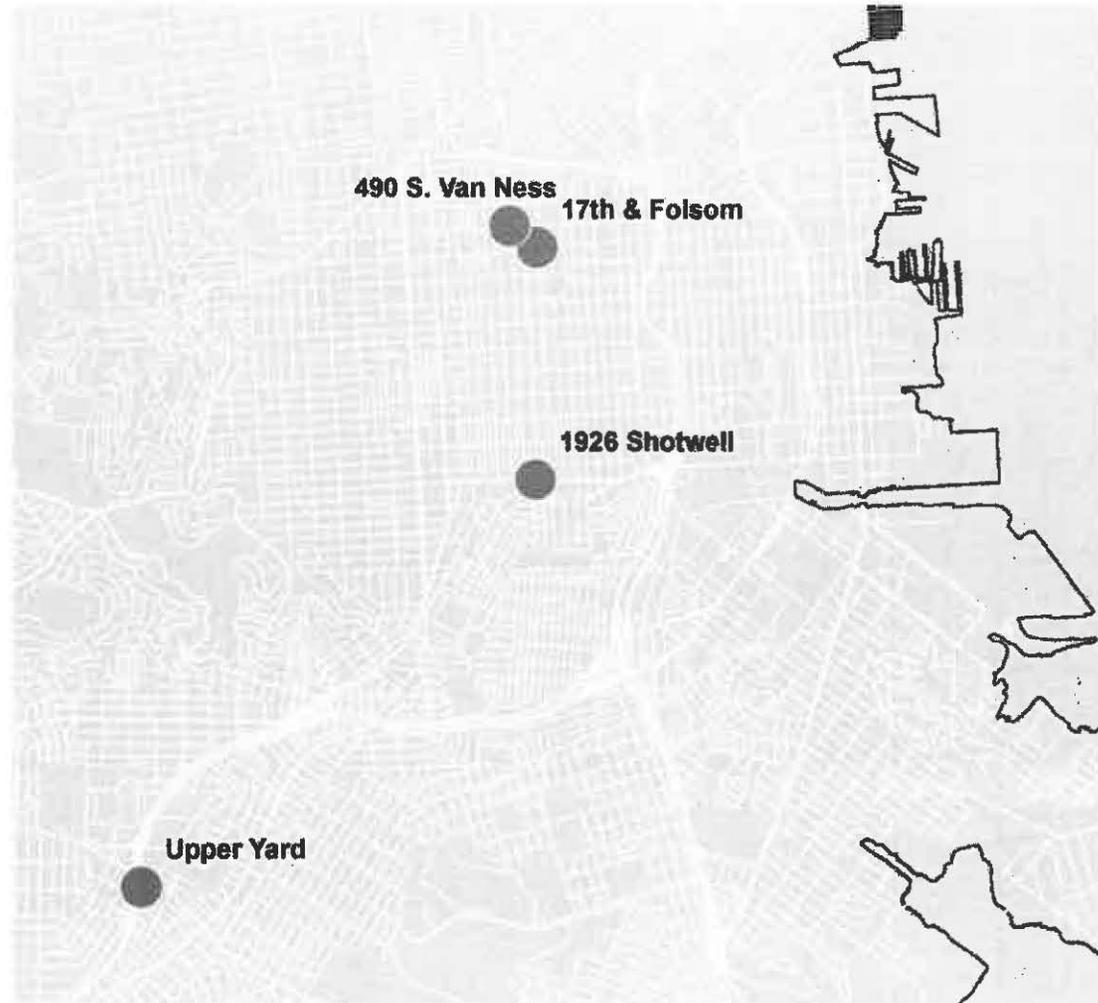
**Up to 120% AMI**

**Teacher Next Door Down Payment Assistance (TND)**

**Up to 200% AMI**



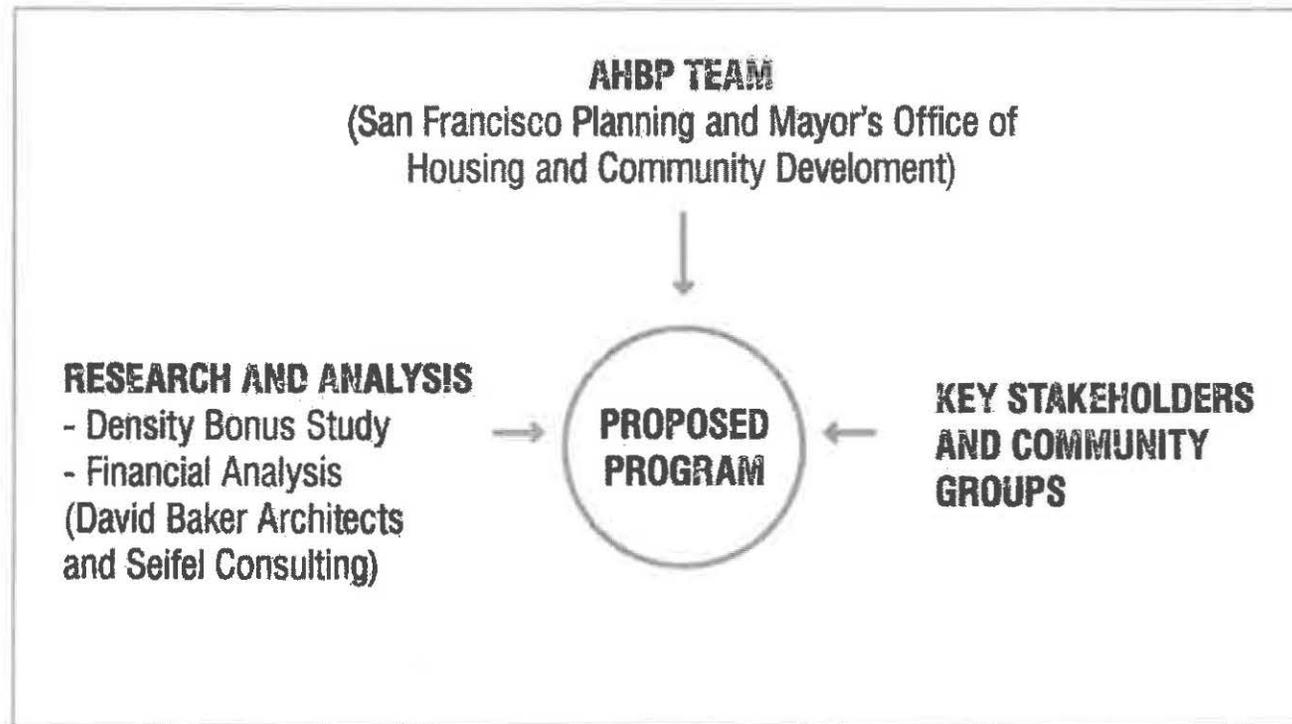
# LOCAL PROGRAM: 100% AFFORDABLE PROJECTS



# HOW WE DEVELOPED THE PROGRAM

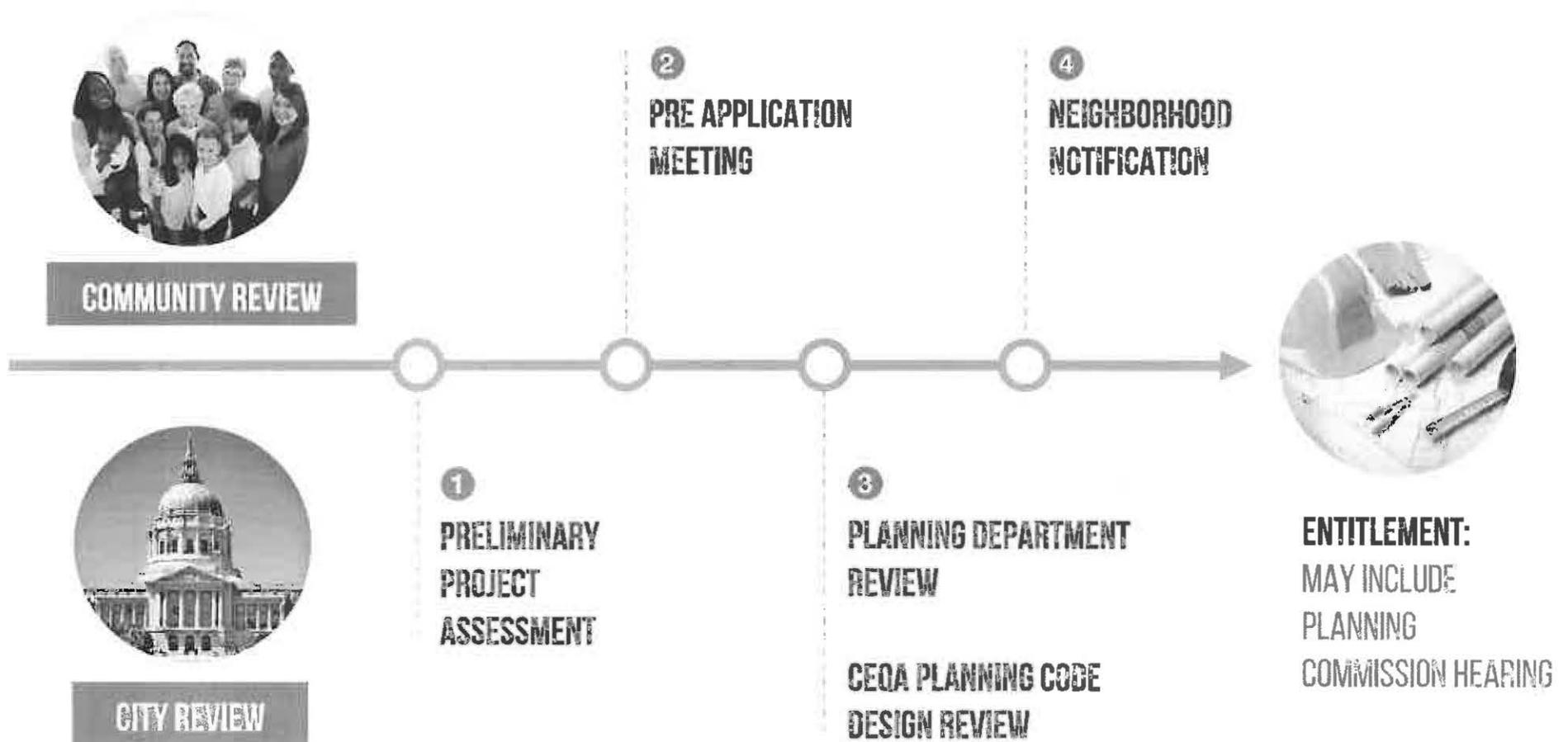
# HOW WE DEVELOPED THE PROGRAM

## PROGRAM DEVELOPMENT (2 YEARS)

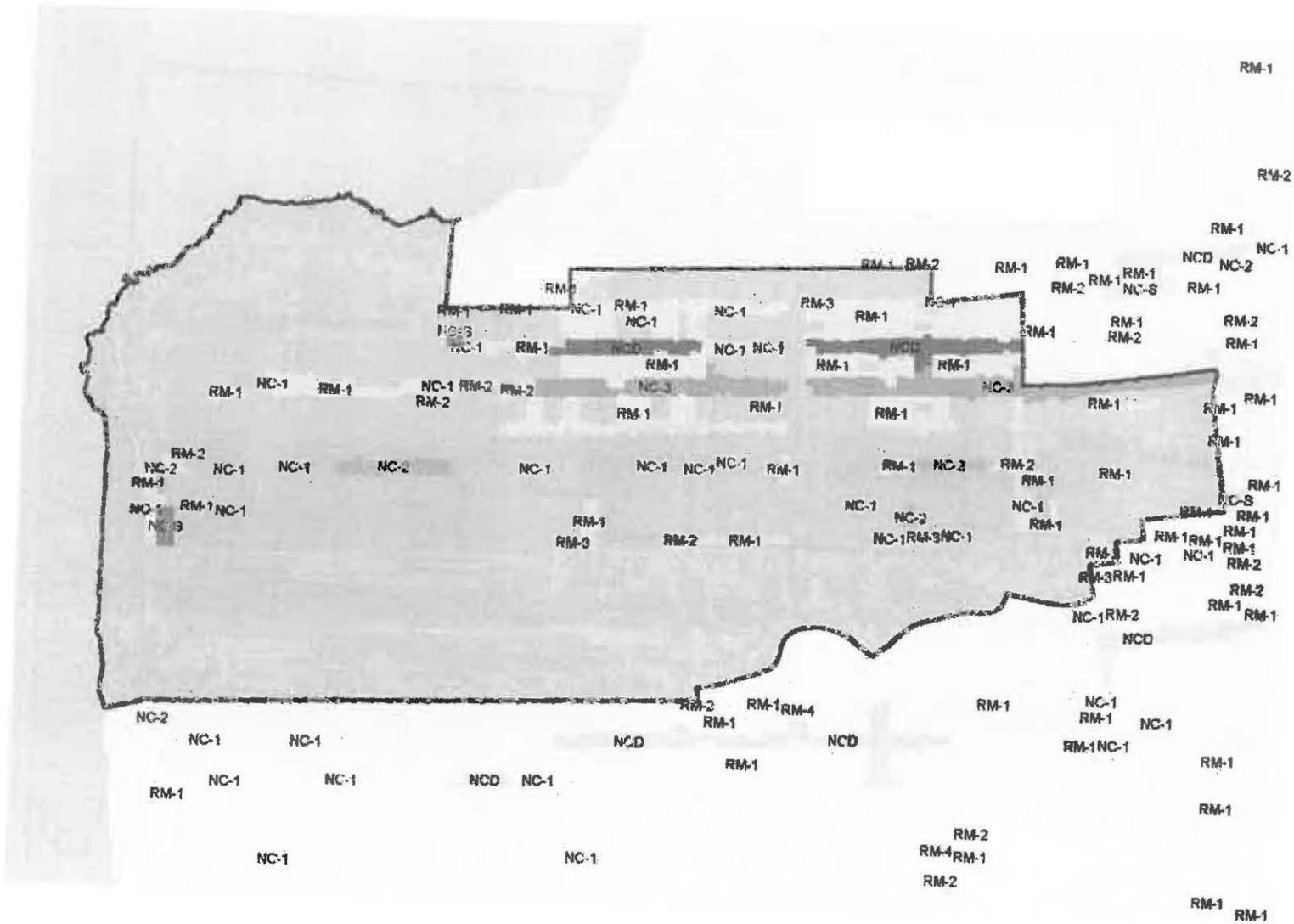


# DESIGN REVIEW PROCESS AND PUBLIC INPUT

PROCESS FOR AFFORDABLE BONUS PROJECTS IS CONSISTENT WITH CURRENT PRACTICE



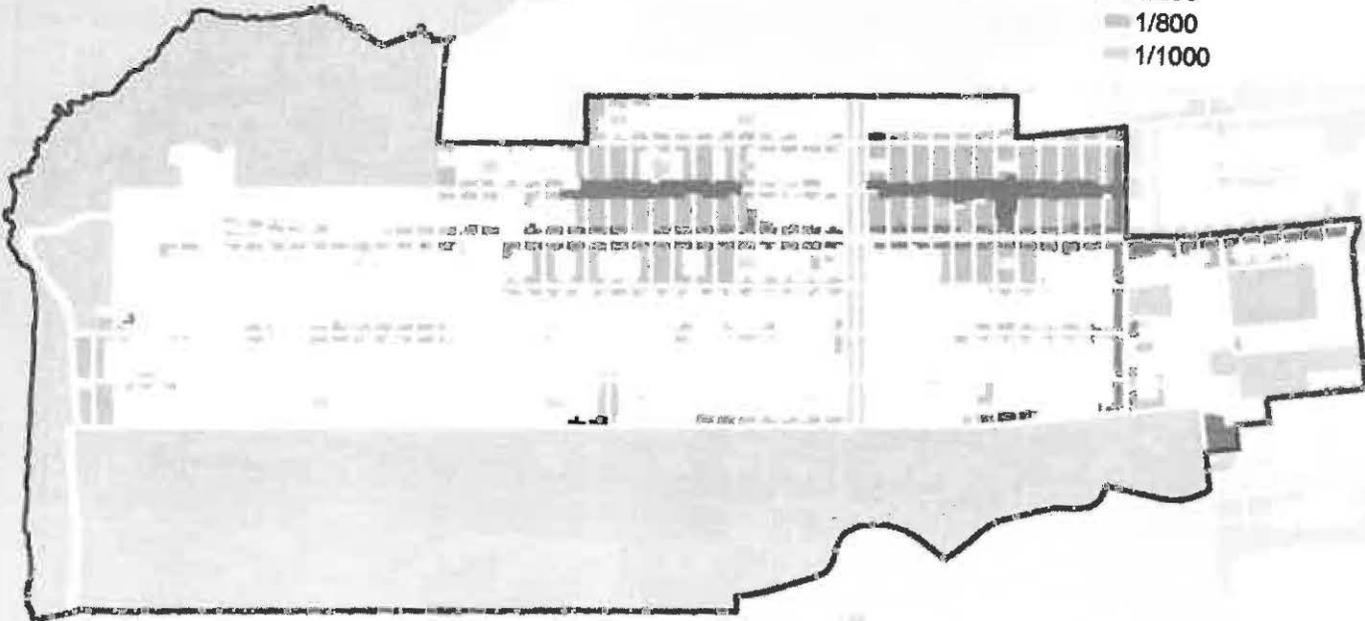
# EXISTING ZONING DISTRICTS



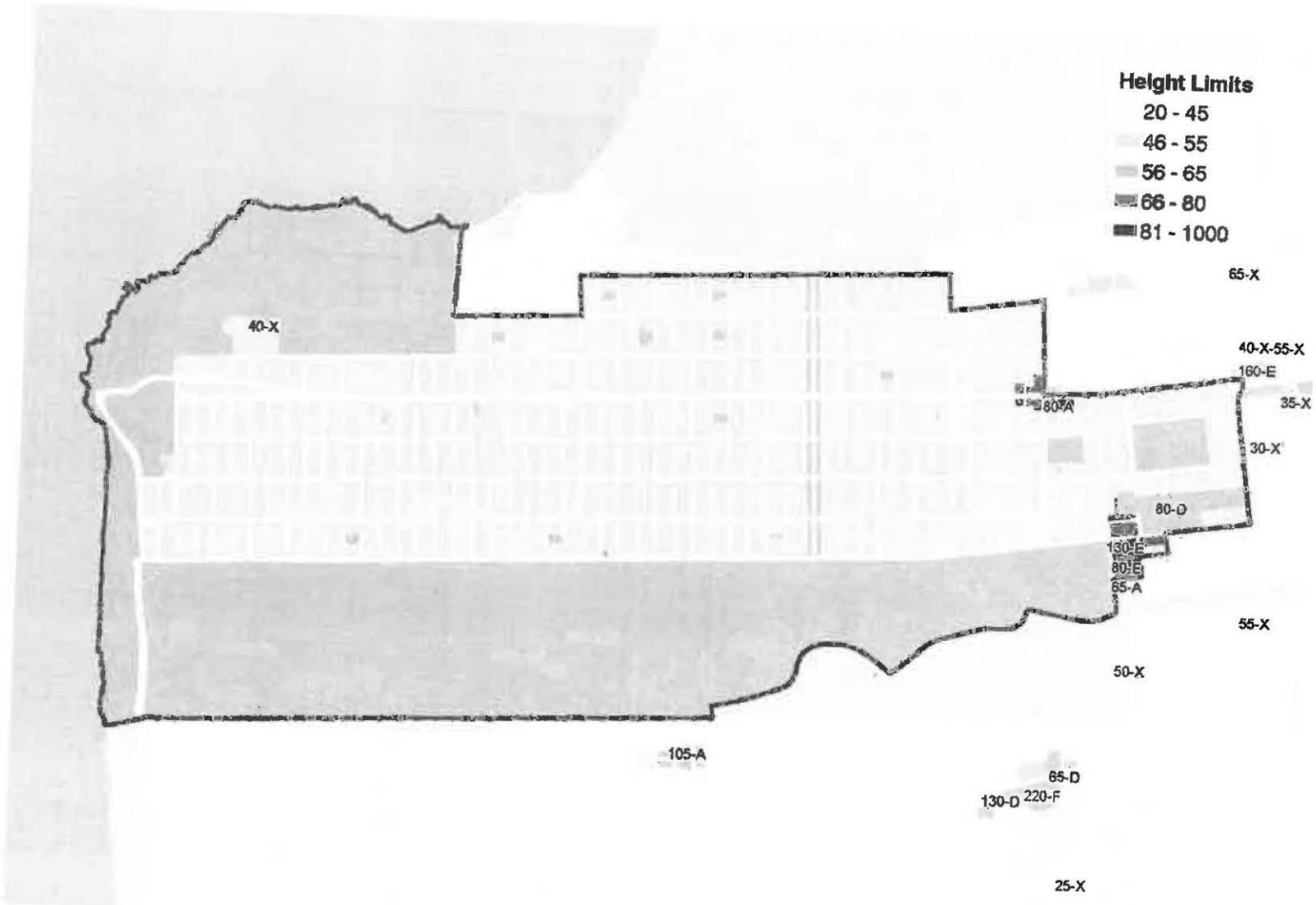
# DENSITY CONTROLS

Density Limits (Units/SF of lot are)

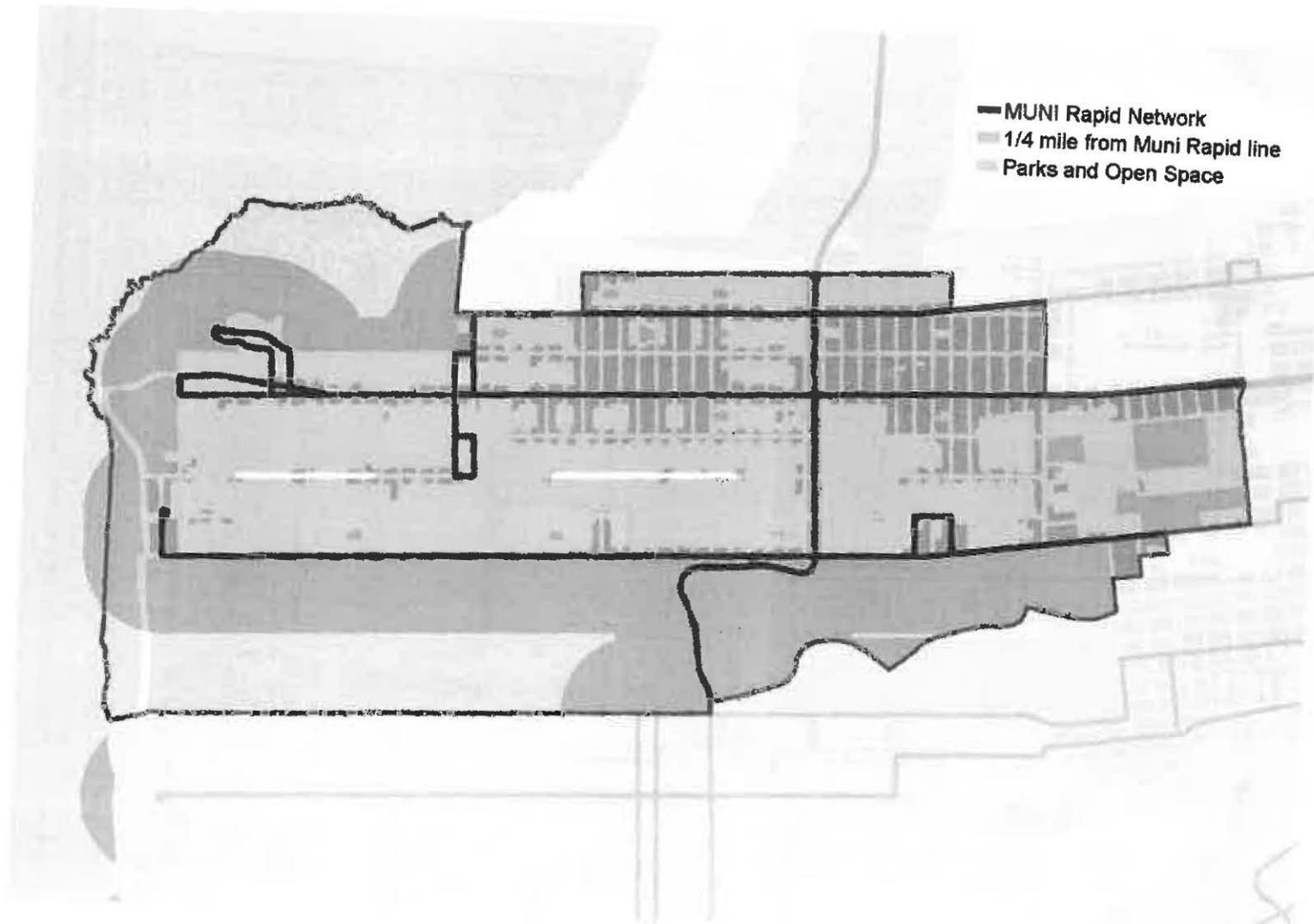
- 1/200
- 1/400
- 1/600
- 1/800
- 1/1000



# HEIGHT LIMITS



# PROGRAM AREA AND TRANSIT





**Fremont City Council**

3300 Capitol Avenue  
Fremont, CA 94538

**SCHEDULED**

Meeting: 04/19/16 07:00 PM

Div/Dept: Planning

Category: Code Adoptions & Amendments

Sponsors:

DOC ID: 2666

**STAFF REPORT (ID # 2666)**

**DENSITY BONUS ORDINANCE UPDATE - CITYWIDE - PLN2016-00276 - Public Hearing (Published Notice) to Consider the Planning Commission's Recommendation to Approve an Update to the City's Density Bonus Ordinance for Compliance with Recent Revisions in State Law, and to Consider an Exemption to the Requirements of the California Environmental Quality Act (CEQA) Pursuant to CEQA Guidelines Section 15061(b)(3) in that the Proposed Update is not an Activity that Would Have the Potential to Cause a Significant Effect on the Environment.**

**Contact Persons:**

Name: Kristie Wheeler  
Title: Planning Manager  
Div/Dept: Planning  
Phone: 510-494-4454  
E-Mail: kwheeler@fremont.gov

Jeff Schwob  
Director  
Community Development  
510-494-4527  
jschwob@fremont.gov

**Executive Summary:** A Zoning Text Amendment is proposed to update Fremont Municipal Code (FMC) Chapter 18.165 (Density Bonus and Affordable Housing Incentives) to provide compliance with recent revisions in state planning and zoning law. The Planning Commission held a public hearing on March 24, 2016, to consider the proposed Zoning Text Amendment and voted 6-0-1 (one Commissioner absent) to recommend approval to the City Council as shown in Exhibit "A."

**BACKGROUND:** Consistent with state planning and zoning law, FMC Chapter 18.165 provides incentives for the production of housing for very-low income, low income and senior households and for the production of housing for moderate income households residing in condominium and planned development projects. In providing such incentives, it is the intent of the City to facilitate the development of affordable housing and implement the goals, objectives and policies of the General Plan Housing Element.

Under existing state law, a city or county must grant a density bonus and other incentives or concessions when a developer proposes lower income housing units or the donation of land within a project and agrees to construct a specified percentage of units for very-low, low or moderate income households, among other things. In addition, existing state law prohibits a city or county from requiring parking in excess of specified ratios when a housing development meets these criteria. This prohibition applies only at the request of the developer and specifies that the developer may request additional parking incentives or concessions.

In addition to the above provisions, the recent adoption of Assembly Bill (AB) 744 prohibits a city or county from requiring a parking ratio, inclusive of handicapped and guest parking, in excess of 0.5 spaces per bedroom when requested by a developer and a proposed housing development (rental and for-sale) includes the maximum percentage of very-low and low income units; is located within ½ mile of a major transit stop; and there is unobstructed access to the transit stop from the development. AB 744 also prohibits a city or county from requiring a parking ratio, inclusive of handicapped and guest parking, in

excess of specified amounts per unit when all the units in a rental housing development are proposed at an affordable housing cost to lower income households; the housing development is within ½ mile of a major transit stop; and there is unobstructed access to the transit stop from the development. The prohibition on requiring specified parking ratios also applies under AB 744 to for-rent housing developments for individuals that are 62 years of age or older or a special needs housing development that have either paratransit service or unobstructed access, within ½ mile, to fixed bus route service that operates at least eight times per day.

Previously, state planning and zoning law required continued affordability for 30 years or longer of all very-low and low income units that qualified a developer for a density bonus. Recent adoption of AB 2222 now requires continued affordability for 55 years or longer of all very-low and low income rental units. For-sale units that are affordable to very-low and low income households would continue to have a 30-year restriction. AB 2222 also requires replacement housing when an application for a density bonus is proposed on a site that has existing affordable rental housing, or previously had such housing, as specified.

Finally, previous state planning and zoning law required a city or county to grant a density bonus or other incentives when a developer requested approval to convert apartments to a condominium project and agreed to provide a specified percentage of units for low or moderate income households. AB 2222 now prohibits a developer from receiving a density bonus unless the proposed condominium project would replace the existing affordable units (or previously existing affordable units, as specified) with at least the same number of affordable units of equivalent size or type, or both, and the proposed development contains affordable units according to specified percentages or consists entirely of affordable units.

### ***Planning Commission Hearing***

On March 24, 2016, the Planning Commission held a public hearing to consider the proposed Zoning Text Amendment and voted 6-0-1 (one Commissioner absent) to recommend approval to the City Council. Included in their recommendation was a request for clarification regarding the definition of a major transit stop. As proposed, the draft definition states, in part, "Major transit stop means an existing site, or a site included in the regional transportation plan, that contains a rail transit station, a ferry terminal served by either a bus or rail transit service, or the intersection of two or more major bus routes with a frequency of service interval of 15 minutes or less during the morning and afternoon peak commute periods." With regard to the bus routes' frequency of service, the Commission asked if each intersecting bus route would be required to have a frequency of service interval of 15 minutes or less. Staff reviewed state law and confirmed that the interval of 15 minutes or less would apply to each route and has added clarifying language to the definition.

### **DISCUSSION/ANALYSIS:**

#### ***Project Description***

The proposed Zoning Text Amendment would update the following sections of FMC Chapter 18.165 in compliance with existing planning and zoning law:

1. Section 18.165.020 (Definitions) would add definitions for the following:

- "Major transit stop."
  - "Special needs housing"
  - "Specific adverse impact"
  - "Unobstructed access"
2. Sections 18.165.030 (Calculation of density bonus and number of incentives and concessions), 18.165.040 (Land donation), 18.165.050 (Child care facilities) and 18.165.060 (Condominium conversions) would address new requirements to provide replacement housing when an application for a density bonus is proposed on a site that has existing affordable rental housing.
  3. Section 18.165.070 (Affordability and development standards) would specify that affordable rental units must be restricted for a minimum period of 55 years.
  4. Section 18.165.075 (Modified parking standards) would provide additional reductions to required parking ratios for housing developments that are eligible for a density bonus as shown in the table below:

| Type of development   | Maximum number of required off-street parking spaces |
|---|--|
| Rental or ownership housing with: <ol style="list-style-type: none"> <li>1. At least 11% very low income or 20% low income units; <b>and</b></li> <li>2. Within one-half mile of a major transit stop; <b>and</b></li> <li>3. Unobstructed access to the major transit stop.</li> </ol>   | 0.5 per bedroom                                      |
| Rental housing with: <ol style="list-style-type: none"> <li>1. All units affordable to lower income households except manager's unit(s); <b>and</b></li> <li>2. Within one-half mile of a major transit stop; <b>and</b></li> <li>3. 3. Unobstructed access to the major transit stop.</li> </ol>   | 0.5 per unit   |
| Senior citizen rental housing with: <ol style="list-style-type: none"> <li>1. All units affordable to lower income households except manager's unit(s); <b>and either</b></li> <li>2. Has paratransit service; <b>or</b></li> <li>3. Is within one-half mile of fixed bus route service that operates eight times per day, with unobstructed access to that service.</li> </ol> | 0.5 per unit   |
| Special needs rental housing with: <ol style="list-style-type: none"> <li>1. All units affordable to lower income</li> </ol>  | 0.3 per unit   |

| Type of development   | Maximum number of required off-street parking spaces |
|---|--|
| households except manager's unit(s); <b>and either</b><br>2. Has paratransit service; <b>or</b><br>3. Is within one-half mile of fixed bus route service that operates eight times per day, with unobstructed access to that service. |  |

5. Section 18.165.090 (Application requirements and review) to update the submittal requirements for a density bonus application to reflect the updated provisions.

**General Plan Conformance**

The proposed Zoning Text Amendment would be in conformance with the General Plan and the following policies, implementation measures and actions contained in the Land Use and Housing Elements:

**Land Use Policy 2-2.5: Zoning and Subdivision Regulations**

**Land Use Implementation 2-2.5A: Zoning Update:** Update Fremont's zoning regulations, to achieve consistency with the General Plan vision and Land Use plan.

**Land Use Policy 2-2.6: Residential Density Ranges**

**Land Use Implementation 2-2.6.B: Density Bonuses:** Allow densities which exceed the ranges defined in the Land Use Element for projects using State density bonus provisions (including senior housing and affordable housing), and for projects within designated Transit-Oriented Development overlay areas, as shown on the Land Use Map.

**Housing Policy 7.01 Remove Constraints to Housing Development**

**Housing Action 7.01-B: Implement modifications to parking requirements as appropriate:** Parking can be a potential constraint to housing development due to the associated costs. To allow flexibility, the City can consider reduced parking or tandem parking when analysis indicates that residents are likely to need less parking based on income-level and/or proximity to transit. The City has the ability to allow these parking reductions on a case-by-case basis through a Zoning Code Modification Finding.

**Analysis:** The proposed Zoning Text Amendment would ensure that the City is implementing the most recent revisions to state law and allowing density bonuses that would result in housing developments that exceed the ranges specified in the Land Use Element of the General Plan when a specified percentage of units for very-low, low or moderate income households are proposed. In addition, the proposed amendment would remove constraints to affordable housing development by reducing required parking ratios for projects that are eligible for a density bonus.

**Zoning Regulations**

In accordance with FMC Section 18.225.020(b), the Planning Manager has initiated the proposed Zoning Text Amendment. In order to recommend approval to the City Council, the

Planning Commission must make the findings specified in FMC Section 18.225.050, described in the following section.

**Findings for Approval**

In order to approve the proposed Zoning Text Amendment, the City Council must make the following findings in accordance with Fremont Municipal Code Section 18.225.050:

1. The proposed Zoning Text Amendment is consistent with the General Plan, including policies in the Land Use and Housing Elements as enumerated in the staff report.
2. The proposed Zoning Text Amendment furthers the public interest, convenience, and general welfare of the city because it would ensure that Chapter 18.165 is in compliance with state density bonus law and that the City is meeting its legal requirements.

**FISCAL IMPACT:** None.

**ENVIRONMENTAL REVIEW:** The proposed Zoning Text Amendment is exempt from the requirements of the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines Section 15061(b)(3) in that the proposed amendment does not have the potential for causing a significant effect on the environment and is not subject to CEQA review.

**ATTACHMENTS:**

- Draft Ordinance- Density Bonus

**RECOMMENDATIONS:**

1. Hold public hearing.
2. Find that the proposed Zoning Text Amendment is exempt from the requirements of the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines Section 15061(b)(3) because the proposed amendment does not have the potential for causing a significant effect on the environment.
3. Find that the proposed Zoning Text Amendment is consistent with the General Plan, including policies in the Land Use and Housing Elements as enumerated in the staff report.
4. Find that the proposed Zoning Text Amendment furthers the public interest, convenience, and general welfare of the City because it would ensure that Chapter 18.165 is in compliance with state density bonus law and that the City is meeting its legal requirements.
5. Introduce an ordinance amending Fremont Municipal Code Chapter 18.165 (Density Bonus and Affordable Housing Incentives) as shown in Exhibit "A."





Los Angeles County  
Department of Regional Planning

*Planning for the Challenges Ahead*



Richard J. Bruckner  
Director

June 30, 2016

TO: Supervisor Hilda L. Solis, Chair  
Supervisor Mark Ridley-Thomas  
Supervisor Sheila Kuehl  
Supervisor Don Knabe  
Supervisor Michael D. Antonovich

FROM: Richard J. Bruckner  
Director

**REPORT ON BOARD MOTION REGARDING THE EQUITABLE DEVELOPMENT  
WORK PROGRAM (AGENDA ITEM NO. 2, DECEMBER 8, 2015)**

On December 8, 2015, the Los Angeles County Board of Supervisors (Board) instructed the Director of the Department of Regional Planning (DRP), in coordination with the directors of other appropriate departments, potentially including but not limited to Public Works (DPW), Public Health (DPH), Parks and Recreation (DPR), Community Development Commission (CDC), County Counsel, and the Fire Department (FD), to initiate an Equitable Development Work Program consisting of the following:

- Update the Density Bonus Ordinance to further ease and incentivize the development of affordable housing. The update should reflect state law changes effected by Assembly Bill (AB) 2222 and AB 744, including the incorporation of a "no net loss" policy and parking requirement revisions; establish targets for deeper and higher levels of affordability, including a category for extremely low-income households; and other changes to strengthen the effectiveness of the ordinance.
- Initiate discussions with the City of Los Angeles on a nexus study for the creation of a linkage fee.
- Provide a menu of options for the implementation of an inclusionary housing program. The program should consider on-site affordable units as a mandatory component of for-sale housing projects and propose approaches to requiring rental projects to provide on-site affordable units in exchange for discretionary entitlements, public subsidy, and other public concessions.

- Review the regulatory barriers to the establishment and expansion of community land trusts and other shared equity models, and potential incentives to provide their greater adoption.
- Propose additional strategies to preserve existing affordable housing and incentivize the protection of new affordable housing; identify any necessary procedural and state and local legislative adjustments.
- Produce a map of contaminated sites, such as Superfund sites, brownfields, and toxic "hotspots" in the unincorporated areas, and provide recommendations on targeted land use policies that can be used to improve the health and quality of life for surrounding residents.
- Develop tools, including heat maps, equity scorecards, healthy design guidelines, and other approaches to evaluate, monitor, and advance equity objectives in the implementation of the General Plan, using relevant data from other County departments as necessary to ensure a comprehensive analysis.
- Direct the Director of Planning to develop a framework for facilitating robust engagement with affordable housing, economic development, and environmental justice experts designed to provide technical assistance in carrying out this work and to support the Board in strengthening these equitable development tools and exploring new policies that promote equitable growth. The framework may include establishment of an advisory committee.
- Develop the Equitable Development Work Program in consultation with the Healthy Design Workgroup, the Homeless Initiative, and the Affordable Housing Steering Committee, to ensure efficiencies and coordination, and report back to the Board in writing quarterly with an update on the status of implementation and a timeline for the advancement of ongoing initiatives.
- Chief Executive Officer to coordinate with the Director of Planning and other departments, and to include real estate development and building industry experts in the potential advisory committee and outreach of the Equitable Development Work Program.
- To include the following in the report back to the Board: An explanation of AB 2222 and the "no net loss" policy; whether density bonuses are ministerial or require a public hearing; whether density bonuses are usually met with community opposition because additional California Environmental Quality Act analysis is not required, but create additional traffic; whether density bonuses are subject to the same parking requirements as market rate units; the definition of a linkage fee; the necessary analysis to determine the impact a linkage fee will have on housing development; the reason for joining with the City of Los Angeles on a linkage fee study and how the revenue would be split with them; whether DRP has the resources to deal with proposed linkage fees; the number of units necessary to have a mandatory affordable housing program; the definition of a community land trust; examples of other shared equity models; the definition of equity scorecards and how they can be used for or against new development; whether the objectives can be accomplished in an individual Community Standards District or Countywide; and whether to include

representatives from the development community, including builders, engineers and architects on the advisory council.

This report back provides an overview of DRP's and other relevant departments' efforts over the second quarter of 2016. It also provides additional clarifying information as requested by the Board.

## **I. AFFORDABLE HOUSING**

### **Density Bonus Ordinance**

In this second quarter, DRP met with CDC to continue discussing common problems and challenges in permit processing, affordable housing monitoring, and fee and penalty collection. This will be used to inform the development of the draft ordinance. DRP will continue to coordinate with CDC to streamline the permitting process and improve monitoring procedures. In addition, DRP worked with County Counsel to finalize a draft interim memo to implement AB 2222 to facilitate continued compliance with the State Density Bonus Law until the ordinance update is completed. The interim memo, which is currently being reviewed by stakeholder groups and housing advocates, is anticipated to be issued in early July.

### **Linkage Fee, Inclusionary Housing, Affordable Housing Preservation, and Community Land Trusts and Other Shared Equity Models**

In this second quarter, DRP developed a scope of work for a consultant team that can prepare the necessary analyses for a comprehensive affordable housing strategy that is tailored for the unincorporated areas, and will include considerations for a linkage fee on development, inclusionary housing, affordable housing preservation, and community land trusts and other shared equity models. In May 2016, staff attended a workshop on community land trusts and cooperatives hosted by the nonprofit group T.R.U.S.T. South Los Angeles.

### **Other Affordable Housing Efforts: Second Unit Ordinance Update and Pilot Program**

As part of the Homeless Initiative, DRP is updating the Second Unit Ordinance to reduce obstacles to producing and preserving this lower-cost housing option. DRP is also working with CDC to create a Second Unit Pilot Program to create, rehabilitate, or improve the design of second units. During the reporting period, DRP has been meeting internally, with CDC, and with a broader interdepartmental Second Unit Pilot Program working group to discuss policy proposals and program design. DRP also attended a community event to solicit input from designers and housing advocates on regulatory challenges to creating second units, and on the design of the Second Unit Pilot Program.

## **II. ENVIRONMENTAL JUSTICE**

### **Toxic Hotspots Map/Green Zones Program**

In the second quarter, DRP continued to collect various federal and state data sources for the toxic hotspots map, based on the input from the stakeholder groups and state agency staff. DRP initiated conversations with FD, DPH, and DPW regarding the types and availability of local data, as well as ways to coordinate the efforts to refine a preliminary draft of the toxic hotspots map. DRP anticipates completion of the draft Toxic Hotspots Map by the end of next quarter. DRP will also initiate community outreach for the Green Zones Program based on the map results as well as recommendations from stakeholder groups to develop land use policies, development standards, and procedural changes that will implement the County's equity and environmental justice goals.

### **Other Environmental Justice Efforts: Recycling and Solid Waste Ordinance**

To support the County's environmental justice and sustainability efforts, DRP is developing an ordinance to amend Title 22 to include definitions, standards, and uses related to recycling and solid waste facilities. The Ordinance will establish permitted uses within the Zoning Code and will serve as a permitting pathway in conjunction with the DPW, DPH, and other County departments and state agencies. The Ordinance will encourage recycling and solid waste facilities in a manner that protects sensitive receptors, helps achieve sustainability and climate goals, and promotes local management of solid waste. DRP has been working closely with County departments and Environmental Justice stakeholders to develop a draft ordinance, which will be completed in 2017. DRP will begin conducting broader outreach with community members, operators of recycling and solid waste facilities, and other stakeholders next quarter. DRP anticipates that an Environmental Impact Report and final ordinance will be completed in 2018.

## **III. TOOLS**

### **Equity Scorecard**

During the second quarter, training on racial equity was provided to the Equity Scorecard Committee (ESC) by the Government Alliance on Race and Equity (GARE). Staff also met with representatives from the County GARE cohort to continue to identify opportunities for collaboration. The ESC also convened on June 9, 2016 to discuss the Parks Needs Assessment. The ESC discussed how the methodology, process, and findings of the Parks Needs Assessment could be used to inform the development of the Equity Scorecard mapping application. DRP also developed a prototype of the mapping application and demonstrated it at the ESC meeting to garner feedback and

comments. DRP will continue to lead and coordinate the activities of the ESC and its three subcommittees – Policy Advisory, GIS/Data Management, and Public Outreach.

#### **IV. STAKEHOLDER ENGAGEMENT**

During the second quarter, DRP reconvened the group of stakeholders, comprised of representatives from legal aid organizations, funders, community organizers, public health experts, and affordable housing developers, in May 2016 and expanded it to include architects and representatives from the real estate and building industry. The group received updates on DRP equity programs including the Equity Scorecard, Recycling and Solid Waste Ordinance, Green Zones Program, Density Bonus Ordinance update, Inclusionary Housing, Linkage Fee, community land trusts, incentive zoning/value capture, and the Second Unit Ordinance update and pilot program. The group discussed DRP's approach to implementing AB 2222 and stakeholders offered to share data and connect the County with additional stakeholders and sources of technical assistance. DRP will reconvene the group in July 2016.

In addition, during the second quarter, DRP continued to meet with the Los Angeles Environmental Justice Network, and also initiated conversations with environmental justice advocates and agencies. DRP hosted its first LA County Green Zones Stakeholder Meeting on June 22, 2016, and was attended by environmental justice advocates, County departments, State agency staff, and researchers. To date, DRP has convened three meetings to receive stakeholder input on the Green Zones Program and the Recycling and Solid Waste Ordinance. DRP has also been exploring additional ways to conduct outreach to Los Angeles County's dispersed urban Indian population. DRP staff attended the Cal State Dominguez Hills Pow Wow and has been in contact with several Native American community organizations, as well as health service organizations to partner in communication efforts.

DRP is currently developing web resources for stakeholders to access detailed descriptions and information on the status of the programs discussed.

The next report back will be provided to you no later than September 30, 2016.

Each Supervisor  
June 30, 2016  
Page 6

Should you have any questions about this report, please contact Connie Chung, General Plan Development and Housing Section, at (213) 974-6417 or [cchung@planning.lacounty.gov](mailto:cchung@planning.lacounty.gov).

RJB:MC:CC:ems

c: Executive Office, Board of Supervisors  
County Counsel  
Chief Executive Office  
Chief Information Office  
Community Development Commission  
Fire Department  
Internal Services  
Parks and Recreation  
Public Health  
Public Works

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**From:** John Shepardson <shepardsonlaw@me.com>  
**Sent:** Wednesday, August 17, 2016 1:06 AM  
**To:** BSpector; Marico Sayoc; Steven Leonardis; Rob Rennie; Marcia Jensen; Greg Larson; Robert Schultz; Council  
**Subject:** No. 40-AB No. 2222 (Legislative Counsel's Digest)

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# California

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**AB-2222 Housing density bonus.**(2013-2014)

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## Assembly Bill No. 2222

### CHAPTER 682

An act to amend Sections 65915 and 65915.5 of the Government Code, relating to housing.

[ Approved by Governor September 27, 2014. Filed with Secretary of State September 27, 2014. ]

### LEGISLATIVE COUNSEL'S DIGEST

AB 2222, Nazarian. Housing density bonus.

The Planning and Zoning Law requires, when a developer of housing proposes a housing development within the jurisdiction of the local government, that the city, county, or city and county provide the developer with a density bonus and other incentives or concessions for the production of lower income housing units or the donation of land within the development if the developer, among other things, agrees to construct a specified percentage of units for very low, low-, or moderate-income households or qualifying residents.

Existing law requires continued affordability for 30 years or longer, as specified, of all very low and low-income units that qualified an applicant for a density bonus.

This bill instead would require continued affordability for 55 years or longer, as specified, of all very low and low-income rental units that qualified an applicant for a density bonus. This bill would also

include very low and low-income persons among the initial occupants of for-sale units. **This bill also would prohibit an applicant from receiving a density bonus unless the proposed housing development would, for units subject to certain affordability requirements that were occupied by qualifying persons on the date of application,**

**provide at least the same number of units of equivalent size or type, or both, to be made available for rent at affordable housing costs to, and occupied by, persons and families in the same or lower income category as those households in occupancy.**

For those subject types of units that have been vacated or demolished at the time of application, this bill would condition a density bonus upon at least the same number of units of equivalent size or type, or both, as existed at the highpoint in the preceding 5 years being 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.

Existing law also requires a city, county, or city and county to grant a density bonus or other incentives, as specified, when an applicant for approval to convert apartments to a condominium project agrees, among other things, to provide a specified percentage of units for low- or moderate-income persons and families or for lower income households, as defined.

This bill also would prohibit an applicant from receiving a density bonus unless the proposed condominium project would replace the existing affordable units with at least the same number of affordable units of equivalent size or type, or both, and the proposed development, inclusive of the units replaced pursuant to the requirements described above, contains affordable units according to specified percentages or consists entirely of affordable units.

## DIGEST KEY

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

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## BILL TEXT

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

### 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 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 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), the 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, 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. 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).

(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, 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. 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) Paragraph (3) of subdivision (c) does not apply to an applicant seeking a density bonus for a proposed housing development if their 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 adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon public health and safety or the physical environment or on any real property that is listed in the California Register of Historical Resources and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- 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.

(e) (1) In no case may a city, county, or city and county apply any development standard that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted by this section. An applicant may submit to a city, county, or city and county a proposal for the waiver or reduction of development standards that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted under this section, and may request a meeting with the city, county, or city and county. If a court finds that the refusal to grant a waiver or reduction of development standards 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 waive or reduce development standards if the waiver or reduction would have 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 waive or reduce development standards that would have an adverse impact on any real property that is listed in the California Register of Historical Resources, or to grant any waiver or reduction that would be contrary to state or federal law.

(2) A proposal for the waiver or reduction of development standards pursuant to this subdivision shall neither reduce nor increase the number of incentives or concessions to which the applicant is entitled pursuant to subdivision (d).

(f) For the purposes of this chapter, “density bonus” means a density increase over the otherwise maximum allowable residential density as of the date of application by the applicant to the city, county, or city and county. The applicant may elect to accept a lesser percentage of density bonus. The amount of density bonus to which the applicant is entitled shall vary according to the amount by which the percentage of affordable housing units exceeds the percentage established in subdivision (b).

(1) For housing developments meeting the criteria of subparagraph (A) of paragraph (1) of subdivision (b), the density bonus shall be calculated as follows:

| Percentage Low-Income Units | Percentage Density Bonus |
|-----------------------------|--------------------------|
| 10                          | 20                       |
| 11                          | 21.5                     |
| 12                          | 23                       |
| 13                          | 24.5                     |
| 14                          | 26                       |
| 15                          | 27.5                     |
| 17                          | 30.5                     |
| 18                          | 32                       |
| 19                          | 33.5                     |

(2) For housing developments meeting the criteria of subparagraph (B) of paragraph (1) of subdivision (b), the density bonus shall be calculated as follows:

| Percentage Very Low Income Units | Percentage Density Bonus |
|----------------------------------|--------------------------|
| 5                                | 20                       |
| 6                                | 22.5                     |
| 7                                | 25                       |
| 8                                | 27.5                     |
| 9                                | 30                       |
| 10                               | 32.5                     |
| 11                               | 35                       |

(3) For housing developments meeting the criteria of subparagraph (C) of paragraph (1) of subdivision (b), the density bonus shall be 20 percent of the number of senior housing units.

(4) For housing developments meeting the criteria of subparagraph (D) of paragraph (1) of subdivision (b), the density bonus shall be calculated as follows:

| Percentage Moderate-Income Units | Percentage Density Bonus |
|----------------------------------|--------------------------|
| 10                               | 5                        |
| 11                               | 6                        |
| 12                               | 7                        |
| 13                               | 8                        |
| 14                               | 9                        |
| 15                               | 10                       |
| 16                               | 11                       |
| 17                               | 12                       |
| 18                               | 13                       |
| 19                               | 14                       |
| 20                               | 15                       |
| 21                               | 16                       |
| 22                               | 17                       |
| 23                               | 18                       |
| 24                               | 19                       |

|    |    |
|----|----|
| 25 | 20 |
| 26 | 21 |
| 27 | 22 |
| 28 | 23 |
| 29 | 24 |
| 30 | 25 |
| 31 | 26 |
| 32 | 27 |
| 33 | 28 |
| 34 | 29 |
| 35 | 30 |
| 36 | 31 |
| 37 | 32 |
| 38 | 33 |
| 39 | 34 |
| 40 | 35 |

(5) All density calculations resulting in fractional units shall be rounded up to the next whole number. The granting of a density bonus shall not be interpreted, in and of itself, to require a general plan amendment, local coastal plan amendment, zoning change, or other discretionary approval.

(g) (1) When an applicant for a tentative subdivision map, parcel map, or other residential development approval donates land to a city, county, or city and county in accordance with this subdivision, the applicant shall be entitled to a 15-percent increase above the otherwise maximum allowable residential density for the entire development, as follows:

| Percentage Very Low Income | Percentage Density Bonus |
|----------------------------|--------------------------|
| 10                         | 15                       |
| 11                         | 16                       |
| 12                         | 17                       |
| 13                         | 18                       |
| 14                         | 19                       |
| 15                         | 20                       |
| 16                         | 21                       |
| 17                         | 22                       |

|    |    |
|----|----|
| 18 | 23 |
| 19 | 24 |
| 20 | 25 |
| 21 | 26 |
| 22 | 27 |
| 23 | 28 |
| 24 | 29 |
| 25 | 30 |
| 26 | 31 |
| 27 | 32 |
| 28 | 33 |
| 29 | 34 |
| 30 | 35 |

(2) This increase shall be in addition to any increase in density mandated by subdivision (b), up to a maximum combined mandated density increase of 35 percent if an applicant seeks an increase pursuant to both this subdivision and subdivision (b). All density calculations resulting in fractional units shall be rounded up to the next whole number. Nothing in this subdivision shall be construed to enlarge or diminish the authority of a city, county, or city and county to require a developer to donate land as a condition of development. An applicant shall be eligible for the increased density bonus described in this subdivision if all of the following conditions are met:

(A) The applicant donates and transfers the land no later than the date of approval of the final subdivision map, parcel map, or residential development application.

(B) The developable acreage and zoning classification of the land being transferred are sufficient to permit construction of units affordable to very low income households in an amount not less than 10 percent of the number of residential units of the proposed development.

(C) The transferred land is at least one acre in size or of sufficient size to permit development of at least 40 units, has the appropriate general plan designation, is appropriately zoned with appropriate development standards for development at the density described in paragraph (3) of subdivision (c) of Section 65583.2, and is or will be served by adequate public facilities and infrastructure.

(D) The transferred land shall have all of the permits and approvals, other than building permits, necessary for the development of the very low income housing units on the transferred land, not later than the date of approval of the final subdivision map, parcel map, or residential development application, except that the local government may subject the proposed development to subsequent design review to the extent authorized by subdivision (i) of Section 65583.2 if the design is not reviewed by the local government prior to the time of transfer.

(E) The transferred land and the affordable units shall be subject to a deed restriction ensuring continued affordability of the units consistent with paragraphs (1) and (2) of subdivision (c), which shall be recorded on the property at the time of the transfer.

(F) The land is transferred to the local agency or to a housing developer approved by the local agency. The local agency may require the applicant to identify and transfer the land to the developer.

(G) The transferred land shall be within the boundary of the proposed development or, if the local agency agrees, within one-quarter mile of the boundary of the proposed development.

(H) A proposed source of funding for the very low income units shall be identified not later than the date of approval of the final subdivision map, parcel map, or residential development application.

(h) (1) When an applicant proposes to construct a housing development that conforms to the requirements of subdivision (b) and includes a child care facility that will be located on the premises of, as part of, or adjacent to, the project, the city, county, or city and county shall grant either of the following:

(A) An additional density bonus that is an amount of square feet of residential space that is equal to or greater than the amount of square feet in the child care facility.

(B) An additional concession or incentive that contributes significantly to the economic feasibility of the construction of the child care facility.

(2) The city, county, or city and county shall require, as a condition of approving the housing development, that the following occur:

(A) The child care facility shall remain in operation for a period of time that is as long as or longer than the period of time during which the density bonus units are required to remain affordable pursuant to subdivision (c).

(B) Of the children who attend the child care facility, the children of very low income households, lower income households, or families of moderate income shall equal a percentage that is equal to or greater than the percentage of dwelling units that are required for very low income households, lower income households, or families of moderate income pursuant to subdivision (b).

(3) Notwithstanding any requirement of this subdivision, a city, county, or city and county shall not be required to provide a density bonus or concession for a child care facility if it finds, based upon substantial evidence, that the community has adequate child care facilities.

(4) "Child care facility," as used in this section, means a child day care facility other than a family day care home, including, but not limited to, infant centers, preschools, extended day care facilities, and schoolage child care centers.

(i) "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.

(j) (1) The granting of a concession or incentive shall not be interpreted, in and of itself, to require a general plan amendment, local coastal plan amendment, zoning change, or other discretionary approval. This provision is declaratory of existing law.

(2) Except as provided in subdivisions (d) and (e), the granting of a density bonus shall not be interpreted to require the waiver of a local ordinance or provisions of a local ordinance unrelated to development standards.

(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.

(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.

(l) Subdivision (k) does not limit or require the provision of direct financial incentives for the housing development, including the provision of publicly owned land, by the city, county, or city and county, or the waiver of fees or dedication requirements.

(m) This section shall not be construed to supersede or in any way alter or lessen the effect or application of the California Coastal Act of 1976 (Division 20 (commencing with Section 30000) of the Public Resources Code).

(n) If permitted by local ordinance, nothing in this section shall be construed to prohibit a city, county, or city and county from granting a density bonus greater than what is described in this section for a development that meets the requirements of this section or from granting a proportionately lower density bonus than what is required by this section for developments that do not meet the requirements of this section.

(o) For purposes of this section, the following definitions shall apply:

(1) "Development standard" includes a site or construction condition, including, but not limited to, a height limitation, a setback requirement, a floor area ratio, an onsite open-space requirement, or a parking ratio that applies to a residential development pursuant to any ordinance, general plan element, specific plan, charter, or other local condition, law, policy, resolution, or regulation.

(2) "Maximum allowable residential density" means 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. 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.

(p) (1) Upon the request of the developer, no city, county, or city and county shall require a vehicular parking ratio, inclusive of handicapped and guest parking, of a development meeting the criteria of subdivision (b), that exceeds the following ratios:

(A) Zero to one bedroom: one onsite parking space.

(B) Two to three bedrooms: two onsite parking spaces.

(C) Four and more bedrooms: two and one-half parking spaces.

(2) If the total number of parking spaces required for a development is other than a whole number, the number shall be rounded up to the next whole number. For purposes of this subdivision, a development may provide "onsite parking" through tandem parking or uncovered parking, but not through onstreet parking.

(3) This subdivision shall apply to a development that meets the requirements of subdivision (b) but only at the request of the applicant. An applicant may request parking incentives or concessions beyond those provided in this subdivision pursuant to subdivision (d).

## **SEC. 2.**

Section 65915.5 of the Government Code is amended to read:

### **65915.5.**

(a) When an applicant for approval to convert apartments to a condominium project agrees to provide at least 33 percent of the total units of the proposed condominium project to persons and families of low or moderate income as defined in Section 50093 of the Health and Safety Code, or 15 percent of the total units of the proposed condominium project to lower income households as defined in Section 50079.5 of the Health and Safety Code, and agrees to pay for the reasonably necessary administrative costs incurred by a city, county, or city and county pursuant to this section, the city, county, or city and county shall either (1) grant a density bonus or (2) provide other incentives of equivalent financial value. A city, county, or city and county may place such reasonable conditions on the granting of a density bonus or other incentives of equivalent financial value as it finds appropriate, including, but not limited to, conditions which assure continued affordability of units to subsequent purchasers who are persons and families of low and moderate income or lower income households.

(b) For purposes of this section, "density bonus" means an increase in units of 25 percent over the number of apartments, to be provided within the existing structure or structures proposed for conversion.

(c) For purposes of this section, "other incentives of equivalent financial value" shall not be construed to require a city, county, or city and county to provide cash transfer payments or other monetary compensation but may include the reduction or waiver of requirements which the city, county, or city and county might otherwise apply as conditions of conversion approval.

(d) An applicant for approval to convert apartments to a condominium project may submit to a city, county, or city and county a preliminary proposal pursuant to this section prior to the submittal of any formal requests for subdivision map approvals. The city, county, or city and county shall, within 90 days of receipt of a written proposal, notify the applicant in writing of the manner in which it will comply

with this section. The city, county, or city and county shall establish procedures for carrying out this section, which shall include legislative body approval of the means of compliance with this section.

(e) Nothing in this section shall be construed to require a city, county, or city and county to approve a proposal to convert apartments to condominiums.

(f) An applicant shall be ineligible for a density bonus or other incentives under this section if the apartments proposed for conversion constitute a housing development for which a density bonus or other incentives were provided under Section 65915.

(g) An applicant shall be ineligible for a density bonus or any other incentives or concessions under this section if the condominium project 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 condominium project replaces those units, as defined in subparagraph (B) of paragraph (3) of subdivision (c) of Section 65915, and either of the following applies:

(1) The proposed condominium project, inclusive of the units replaced pursuant to subparagraph (B) of paragraph (3) of subdivision (c) of Section 65915, contains affordable units at the percentages set forth in subdivision (a).

(2) 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.

(h) Subdivision (g) does not apply to an applicant seeking a density bonus for a proposed housing development if their application was submitted to, or processed by, a city, county, or city and county before January 1, 2015.

Quoting from [https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201520160AB2556](https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160AB2556)

CALIFORNIA LEGISLATURE— 2015–2016 REGULAR SESSION

**ASSEMBLY BILL**

**No. 2556**

**Introduced by Assembly Member Nazarian**

**February 19, 2016**

An act to amend Section 65915 of the Government Code, relating to housing.

**LEGISLATIVE COUNSEL'S DIGEST**

AB 2556, as amended, Nazarian. Density bonuses.

The Planning and Zoning Law requires, when an applicant proposes a housing development within the jurisdiction of a local government, that the city, county, or city and county provide the developer with a density bonus and other incentives or concessions for the production of lower income housing units or for the donation of land within the development if the developer, among other things, agrees to construct a specified percentage of units for very low, low-, or moderate-income households or qualifying residents. That law makes an applicant ineligible for a density bonus if the housing development is proposed on property with existing or certain former dwelling units subject to specific affordability requirements, including a form of rent or price control through a public entity's valid exercise of its police power, or on property with existing units occupied by lower or very low income households, unless the proposed housing development replaces those units as prescribed. That law defines "replace" for those purposes: *purposes to mean, among other things, providing the same number of equivalent units to persons or families in the same or lower income categories.*

This bill would revise ~~the~~ that definition of "replace" to require ~~a city, county, or city and county to adopt~~ a rebuttable ~~presumption~~ *presumption, based on certain federal data*, regarding the proportion of lower income ~~renter~~ households that occupy existing ~~units~~ *units*, if the income category of the households in occupancy is not known. The bill, if the property for the proposed housing development is subject to a form of rent or price control through a local government's valid exercise of its police power and is or was occupied by a person or family with an income above lower income, would authorize the city, county, or city and county either to require replacement units to be made available at affordable rent or affordable housing cost to, and occupied by, low-income persons or families, as specified, or to require the units to be replaced in compliance with the rent or price control ordinance of the jurisdiction. By increasing the duties of local officials, this bill would impose a state-mandated local program.

Quoting from

[http://www.kmtg.com/sites/default/files/files/Density%20Bonus%20Law 2015 Web%20Version.pdf](http://www.kmtg.com/sites/default/files/files/Density%20Bonus%20Law%202015%20Web%20Version.pdf)

## How the Density Bonus Law Can Help in a Hostile Jurisdiction

It is important to know that the density bonus is a state law requirement which is mandatory on cities and counties, even charter cities which are free from many other state requirements. A developer who meets the law's requirements for affordable or senior units is entitled to the density bonus and other assistance as of right, regardless of what the locality wants (subject to limited health and safety exceptions). The density bonus statute can be used to achieve reductions in development standards

or the granting of concessions or incentives from jurisdictions that otherwise would not be inclined to grant those items. Examples might include a reduction in parking standards if those standards are deemed excessive by the developer, or other reductions in development standards if needed to achieve the total density permitted by the density bonus.

Developers who nonetheless encounter hostility from local jurisdictions are provided several tools to ensure that a required density bonus is actually granted. Developers are entitled to an informal meeting with a local jurisdiction which fails to modify a requested development standard. If a developer successfully sues the locality to enforce the density bonus requirements, it is entitled to an award of its attorneys' fees. The obligation to pay a developer's

*"A developer who meets the law's requirements for affordable or senior units is entitled to the density bonus and other assistance as of right, regardless of what the locality wants."*

attorneys' fees is a powerful incentive for local jurisdictions to voluntarily comply with the state law density bonus requirements, even when the jurisdiction is not in favor of its effects on the project.

## Density Bonus and Replacement Housing

New legislation effective as of January 1, 2015 (Assembly Bill 2222) requires developers obtaining a density bonus to replace existing affordable units demolished or vacated prior to the density bonus

application, in addition to providing new affordable units.

## Determination Letter - Department of City Planning - City of Los Angeles

[planning.lacity.org/liberty/home/index/pdis/26C73](http://planning.lacity.org/liberty/home/index/pdis/26C73)

1.

May 13, 2016 - DETERMINATION - Density Bonus Affordable Housing Incentives ... residential units including Density Bonus Units. 3. ... The Applicant will present a copy of the

recorded covenant to the ... The **proposed** Project shall **provide** minimum east and west side yard  
..... Section 50052.5 addresses owner-**occupied**.

1/20/2014, 10:55 AM

Quoting from

[http://www.cityofberkeley.info/uploadedFiles/Rent Stabilization Board/Level 3 -  
General/8.a.3. Legislative%20update%20with%20Housing%20Bills%20matrix.pdf](http://www.cityofberkeley.info/uploadedFiles/Rent_Stabilization_Board/Level_3_-_General/8.a.3._Legislative%20update%20with%20Housing%20Bills%20matrix.pdf)

## **Land Use**

### **Before the Governor:**

**AB 2222 (Nazarian)** addresses the preservation of a residential project, or a condominium project, that qualifies for a density bonus set-aside for affordable housing. This bill would provide an incentive, or concession if a proposed housing project where dwelling units have, at any time in the past 12 months, been occupied by very low- or low-income households or subjects to a public housing contract.

However, an applicant may overcome this requirement by providing equivalent affordability and size and/or type of housing units under the density bonus form. This bill increases the required affordability from 30% to 40% for a qualified applicant for a density bonus. The bill is effective January 1, 2019. Governor.

12/01/11

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Quoting from <http://www.cityofpaloalto.org/civicax/filebank/documents/53494>



City of Palo Alto (ID # 7205) City Council Staff Report

**Report Type: Inter-Governmental Legislative Affairs Meeting Date: 8/22/2016 Summary**  
**Title: Governor's By Right Housing Bill -- Status Update**

**Title: Status Update and Potential City Responses to the Governor's "By Right" Housing Bill and Pending Bills Addressing Housing Issues**

**From: City Manager**

**Lead Department: Planning and Community Environment**

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**From:** John Shepardson <shepardsonlaw@me.com>  
**Sent:** Wednesday, August 17, 2016 1:39 AM  
**To:** BSpector; Marico Sayoc; Steven Leonardis; Rob Rennie; Marcia Jensen; Council; Laurel Prevetti; Robert Schultz; Joel Paulson  
**Subject:** No. 40: Director's Determination (City of LA)

Quoting from the Director's Determination (City of Los Angeles) (emphasis added):

Applicant  
Dora Leong Gallo  
A Community of Friends 3701 Wilshire Blvd., Ste. 700 Los Angeles, CA 90010

Property Owner  
METRO  
1 Gateway Plaza, Mail Stop 99-23-4 Los Angeles, CA 90012

Representative  
Noah Adler  
Craig Lawson & Co., LLC 3221 Hutchison Ave., Ste. D Los Angeles, CA 90034

Los Angeles, CA 90012-4801

VINCENT P. BERTONI, AICP

DIRECTOR

(213) 978-1271

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DEPUTY DIRECTOR

(213) 978-1274

JAN ZATORSKI

DEPUTY DIRECTOR

(213) 978-1273 FAX: (213) 978-1275

INFORMATION

<http://planning.lacity.org>

200 N. Spring Street, Room 525 **City of Los Angeles** EXECUTIVE OFFICES

CALIFORNIA

ERIC GARCETTI MAYOR

DIRECTOR'S DETERMINATION  
DENSITY BONUS AFFORDABLE HOUSING INCENTIVES

**DETERMINATION - Density Bonus Affordable Housing Incentives**

Case No. CEQA: Location:

Council District: Neighborhood Council Community Plan Area: Land Use Designation: Zone: Legal Description:

## **Housing Replacement**

With Assembly Bill 2222, applicants of Density Bonus projects filed as of January 1, 2015 must demonstrate compliance with the housing replacement provisions, which require replacement of rental dwelling units that either exist at the time of application of a Density Bonus project or have been vacated or demolished in the five-year period preceding the application of the project. This applies to all pre-existing units that 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; are subject to any other form of rent or price control; or are occupied by Low or Very Low Income Households. Pursuant to the Determination made by the Housing and Community Investment Department (HCIDLA) dated October 15, 2015, no units will need to be replaced with units affordable to Low or Very Low Income Households as there were no residential units on the property for the last five years. [Refer to the Density Bonus Legislation Background section of this determination for additional information.]

## **DENSITY BONUS LEGISLATION BACKGROUND**

The California State Legislature has declared that "[t]he availability of housing is of vital statewide importance," and has determined that state and local governments have a responsibility to "make adequate provision for the housing needs of all economic segments of the community." Section §65580, subds. (a), (d). Section 65915 further provides that an applicant must agree to, and the municipality must ensure, the "continued affordability of all Low and

Very Low Income units that qualified the applicant” for the density bonus.

With Senate Bill 1818 (2004), state law created a requirement that local jurisdictions approve a density bonus and up to three “concessions or incentives” for projects that include defined levels of affordable housing in their projects. In response to this requirement, the City created an ordinance that includes a menu of incentives (referred to as “on-menu” incentives) comprised of eight zoning adjustments that meet the definition of concessions or incentives in state law (California Government Code Section 65915). The eight on-menu incentives allow for: 1) reducing setbacks; 2) reducing lot coverage; 3) reducing lot width, 4) increasing floor area ratio (FAR); 5) increasing height; 6) reducing required open space; 7) allowing for an alternative density calculation that includes streets/alley dedications; and 8) allowing for “averaging” of FAR, density, parking or open space. In order to grant approval of an on-menu incentive, the City utilizes the same findings contained in state law for the approval of incentives or concessions.

California State Assembly Bill 2222 went into effect January 1, 2015, and with that Density Bonus projects filed as of that date must demonstrate compliance with the housing replacement provisions which require replacement of rental dwelling units that either exist at the time of application of a Density Bonus project, or have been vacated or demolished in the five-year period preceding the

The California State Legislature has declared that “[t]he availability of housing is of vital statewide importance,” and has determined that state and local governments have a responsibility to “make adequate provision for the housing needs of all economic segments

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preceding the application of the project. This applies to all pre-existing units that 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 (including Rent Stabilization Ordinance); or is occupied by Low or Very Low Income Households (i.e., income levels less than 80 percent of the area median income [AMI]). **The replacement units must be equivalent in size, type, or both and be made available at affordable rent/cost to, and occupied by, households of the same or lower income category as those meeting the occupancy criteria. Prior to the issuance of any Director's Determination for Density Bonus and Affordable Housing Incentives, the Housing and Community Investment Department (HCIDLA) is responsible for providing the Department of City Planning, along with the applicant, a determination letter addressing**

**replacement unit requirements for individual projects.** The City also requires a Land Use Covenant recognizing the conditions be filed with the County of Los Angeles prior to granting a building permit on the project.

Assembly Bill 2222 also increases covenant restrictions from 30 to 55 years for projects approved after January 1, 2015. This determination letter reflects these 55 year covenant restrictions.

Under Government Code Section § 65915(a), § 65915(d)(2)(C) and § 65915(d)(3) the City of Los Angeles complies with the State Density Bonus law by adopting density bonus regulations and procedures as codified in Section 12.22 A.25 of the Los Angeles Municipal Code. Section 12.22 A.25 creates a procedure to waive or modify zoning code standards which may prevent, preclude or interfere with the effect of the density bonus by which the incentive or concession is granted, including legislative body review. The Ordinance must apply equally to all new residential development.

In exchange for setting aside a defined number of affordable dwelling units within a development, applicants may request up to three incentives in addition to the density bonus and parking relief which are permitted by right. The incentives are deviations from the City's development standards, thus providing greater relief from regulatory constraints. Utilization of the Density Bonus/Affordable Housing Incentives Program supersedes requirements of the Los Angeles Municipal Code and underlying ordinances relative to density, number of units, parking, and other requirements relative to incentives, if requested.

For the purpose of clarifying the Covenant Subordination Agreement between the City of Los Angeles and the United States

Department of Housing and Urban Development (HUD) note that the covenant required in the Conditions of Approval herein shall prevail unless pre-empted by State or Federal law.

**Only an applicant or any owner or tenant of a property abutting, across the street or alley from, or having a common corner with the subject property can appeal this Density Bonus Compliance Review Determination.** Per the Density Bonus Provision of State Law (Government Code Section §65915) the Density Bonus increase in units above the base density zone limits and the appurtenant parking reductions are not a discretionary action and therefore cannot be appealed. Only the requested incentives are appealable. Per Section 12.22 A.25 of the LAMC, appeals of Density Bonus Compliance Review cases are heard by the City Planning Commission.

JS:)



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**From:** John Shepardson <shepardsonlaw@me.com>  
**Sent:** Wednesday, August 17, 2016 1:40 AM  
**To:** Council  
**Subject:** No. 40: Specific Plans

<https://www.cacities.org/Resources-Documents/Member-Engagement/Professional-Departments/City-Attorneys/Library/2015/Land-Use-101-Webinar-Paper.aspx>

*So what is a Specific Plan and what is the point?*

For some, the concept of a Specific Plan is far less familiar and its purpose is not entirely clear. There are no black and white rules governing when a Specific Plan is required. Instead, a Specific Plan is a tool that public agencies and developers use to achieve better specificity on the vision and development potential of a particular tract of land without having to go through extensive site specific land use analysis and entitlement proceedings. It is “programmatic” in nature and usually deals with major infrastructure, development and conservation standards and includes an implementation program. See Gov. Code section 65451. **Often, a specific plan will establish the “look” and “feel” of what future development on the property will be** and it can provide a more clear and refined definition of the parameters in which development will be allowed and the responsibilities for major infrastructure area developers will be expected to fulfill. Specific plans can be very useful to agencies in setting realistic development expectations and signaling important big picture limitations or constraints unique to a particular area; they can be very useful to developers in helping to size the potential and costs of development. (emphasis added)

**PRACTICE NOTE:** There still appear to be differing practices as to whether a developer’s inclusionary housing triggers the density bonuses or concessions under Govt. Code sections 65915 *et seq.* If there is still any ambiguity in your city’s ordinances, we recommend the city include inclusionary housing within density bonus calculations. See *Latinos Unidos Del Valle De Napa y Solano v. County of Napa*, (2013) 217 Cal. App. 4<sup>th</sup> 1160 (density bonus is mandatory even if the project only includes affordable housing “involuntarily” to comply with a local ordinance).

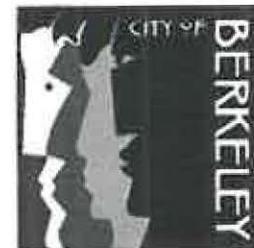
John Shepardson



# **Implementing State Density Bonus Law in Berkeley**

**November 13, 2014**

**City of Berkeley  
Planning & Development  
Department**



# State Density Bonus Law

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- Adopted in 1979, amended several times since
- Main purpose is to promote production of affordable housing
- Applies only to projects with 5 or more dwelling units (does not apply to group living)

# State Density Bonus Law

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- 3 main concepts:
  - Density Bonus
  - Concessions/Incentives
  - Waivers/Reductions



# State Density Bonus Law

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- Density Bonus = “a density increase over the otherwise *maximum allowable residential density* as of the date of [project] application.”

# State Density Bonus Law

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- Maximum allowable residential density = “the density allowed under the zoning ordinance and land use element of the general plan, or if a range of density is permitted, the maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project.”



# State Density Bonus Law

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Minimum affordability required (without bonus units):

- $\geq 10\%$  lower income (80% AMI)
- $\geq 5\%$  VLI (50% AMI)
- Senior projects
- Condo project with  $\geq 10\%$  moderate income (120% AMI)

# State Density Bonus Law

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Required bonus for projects with VLI units:

| % VLI Units | % Density Bonus |
|-------------|-----------------|
| • 5         | 20              |
| • 6         | 22.5            |
| • 7         | 25              |
| • 8         | 27.5            |
| • 9         | 30              |
| • 10        | 32.5            |
| • 11        | 35              |

# State Density Bonus Law

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Required concessions/incentives for project with VLI units (without bonus units):

| % VLI Units | # of concessions/incentives |
|-------------|-----------------------------|
| ○ 5         | 1                           |
| ○ 10        | 2                           |
| ○ 15        | 3                           |

# State Density Bonus Law

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- Definition of “concession or incentive”:
  - “A reduction in site development standards or a modification of zoning code requirements... including, but not limited to, a reduction in setback and square footage requirements and in the ratio of vehicular parking spaces...”
  - “Approval of mixed-use zoning...”
  - “Other regulatory incentives or concessions proposed by the developer or the city... that result in identifiable, financially sufficient, and actual cost reductions.”



# State Density Bonus Law

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- Examples of concessions awarded on previous projects in Berkeley
  - Additional ceiling height
  - Reduced parking
  - Reduced open space
  - Ground floor commercial space (in what would otherwise be an all-residential building)



# State Density Bonus Law

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- Concessions must be granted unless City finds that the requested concession:
    - Is not required to provide for affordable housing costs
    - Would have a specific adverse impact, as defined in 65589.5, upon public health and safety or the physical environment, or on any property listed on the California Register of Historical Resources, and for which there is no feasible mitigation without rendering the project unaffordable
    - Would be contrary to state or federal law
- 

# State Density Bonus Law

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## Waivers or Reductions

- Basis: 65915(e)(1): “In no case may a city... apply any development standard that will have the effect of physically precluding the construction of a development... at the densities or with the concessions or incentives permitted by this section. An applicant may submit to a city... a proposal for the *waiver or reduction of development standards* that will have the effect of *physically precluding* [a project with] the densities or concessions or incentives permitted under this section...”
- 

# State Density Bonus Law

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## Waivers or Reductions

- Waivers or reductions do not reduce or increase the number of concessions/incentives – they implement the required concessions/incentives (and the density bonus)

# State Density Bonus Law

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Recent amendment (AB 2222):

- Affordability required for 55 years (previously 30 years)
- Existing affordable units (or affordable units demolished or vacated in last 5 years) must be replaced as part of new project, at same level of affordability as existing
- Applies to applications submitted by January 1, 2015

# Berkeley's Density Bonus Procedures:

## ○ Affordable Housing Mitigation Fee

- Based on nexus study
- Applies to projects with 5 or more new rental units
- Requires fee of \$28K per market-rate unit
- Fee waived if 10% of total market-rate units (including density bonus units) are provided as VLI units – works out to 9.1% of total

# Berkeley's Density Bonus Procedures:

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- **Density Bonus** = a density increase over the otherwise maximum allowable residential density...[65915.(f)]
- **Dilemma**: Most housing projects are located in district without density standards – what is “maximum allowable density” in Berkeley?

# Berkeley's Density Bonus Procedures:

## General Plan Density Standards

- The General Plan provides density ranges but states that these are “for general planning purposes” and “are not intended to be used as standards to determine the maximum allowable density on a specific parcel,” and that “allowable densities... are established in the more detailed and specific Zoning Ordinance.”

# ZONING DISTRICTS WITH NO DENSITY STANDARDS

| Types of Projects  | Allowed in these Zoning Districts:                |
|--|---|
| <b>Mixed-Use Projects</b> <ul style="list-style-type: none"><li>•Commercial</li><li>•Residential</li></ul> | <b>Commercial Districts and MU-R</b>              |
| <b>Multi-Family Residential Projects</b>   | <b>Commercial Districts, R-3, R-4, R-S, R-SMU</b> |

# Four Basic Steps

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- 1) Calculate the “Base Project”
- 2) Calculate Density Bonus
- 3) Review Concessions
- 4) Grant waivers/reductions of development standards

Slide 19

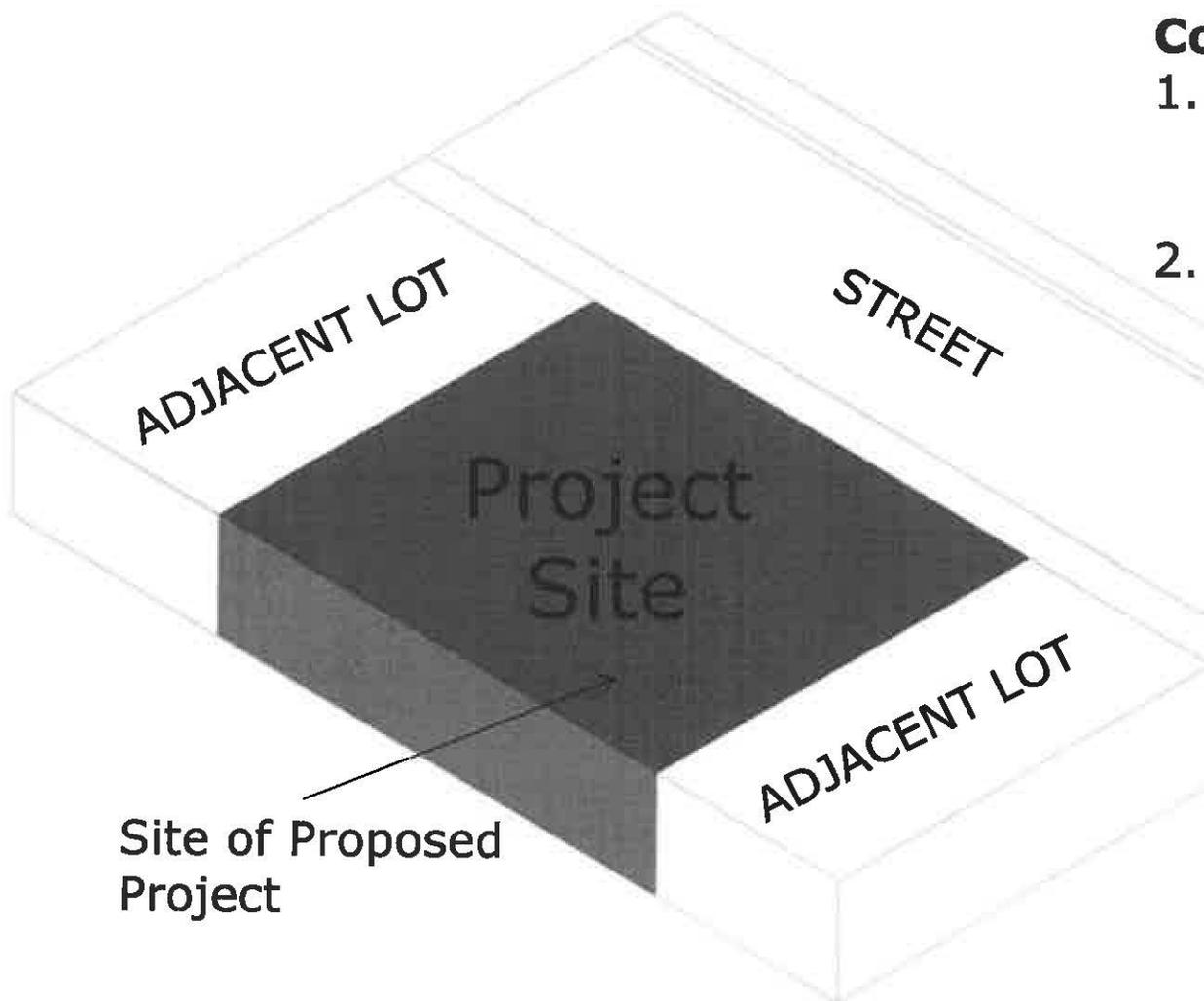
drs1 Could you make these bolder, or change font -- they didn't show up very well when projected.

6/20/2013, 4:40:20 PM

# Step 1: Define the Base Project

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“Maximum Allowable Residential Density”



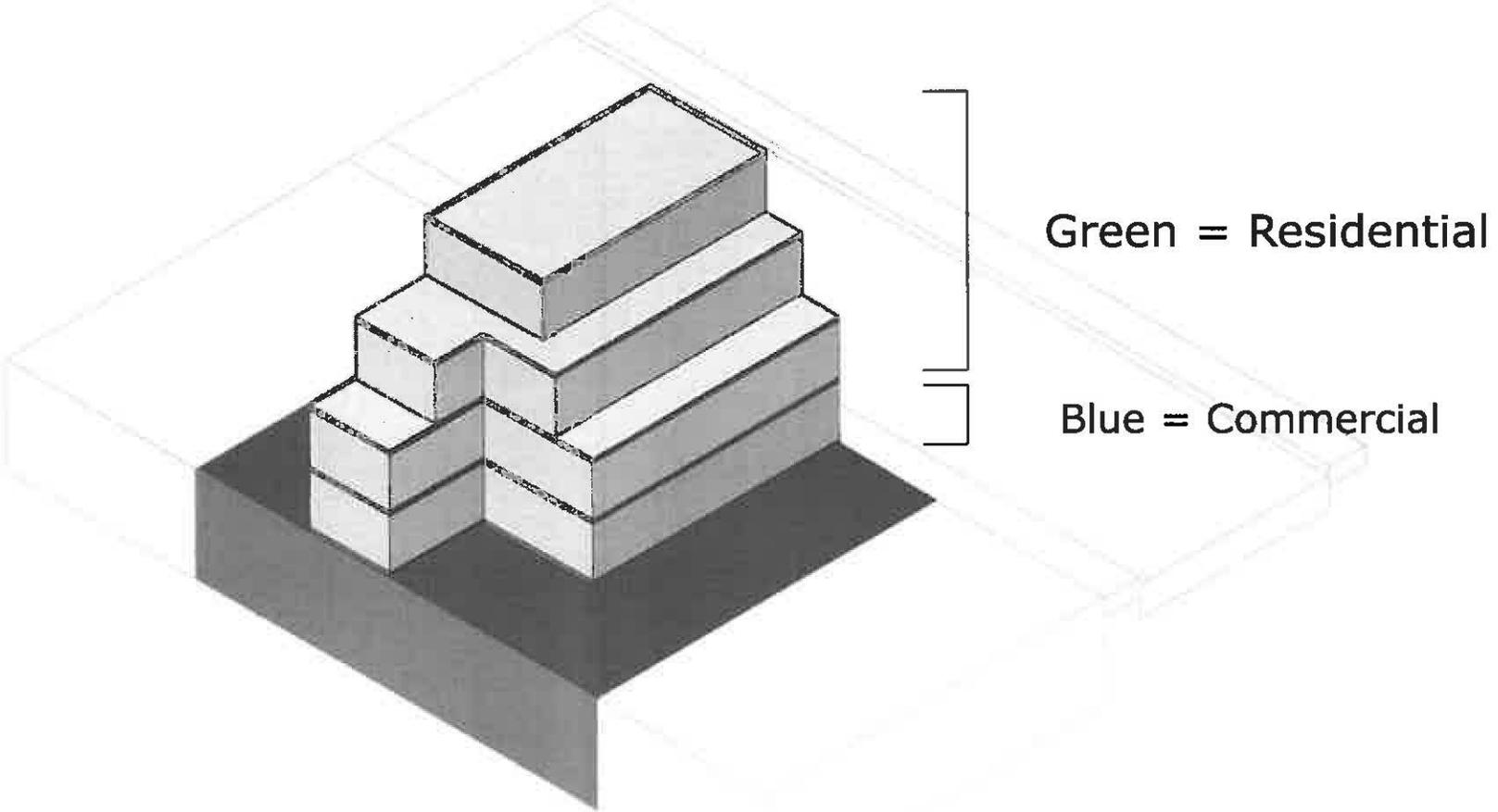
## Conditions:

1. Comply with all codes (zoning, building, fire, etc.)
2. Substantially consistent with “by-right” portion of proposed project (e.g. setbacks, commercial uses, etc.)

Site of Proposed Project



# Step 1A Result: Square Footage, Residential Use



**STEP 1B: DETERMINE PROPOSED PROJECT'S  
AVERAGE RESIDENTIAL UNIT SIZE**

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$$A / B = C$$

**A. Proposed Residential Area (sq. ft.)**

**B. Proposed Number of Units**

**C. Average Unit Size**

## Results Thus Far:

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| STEPS | ITEM                           | VALUE         |
|-------|--------------------------------|---------------|
| 1.A   | Base Project Floor Area        | 40,000 sq. ft |
| 1.B   | Average Unit Size              | 2,000 sq. ft  |
| 1.C   | Base Project Unit Count        | 20 units      |
| 2.A   | # of Affordable Units          |               |
|       | % of Affordable Units          |               |
| 2.B   | % Granted for Density Bonus    |               |
| 2.C   | # of Density Bonus Units       |               |
|       | Proposed Density Bonus Project |               |

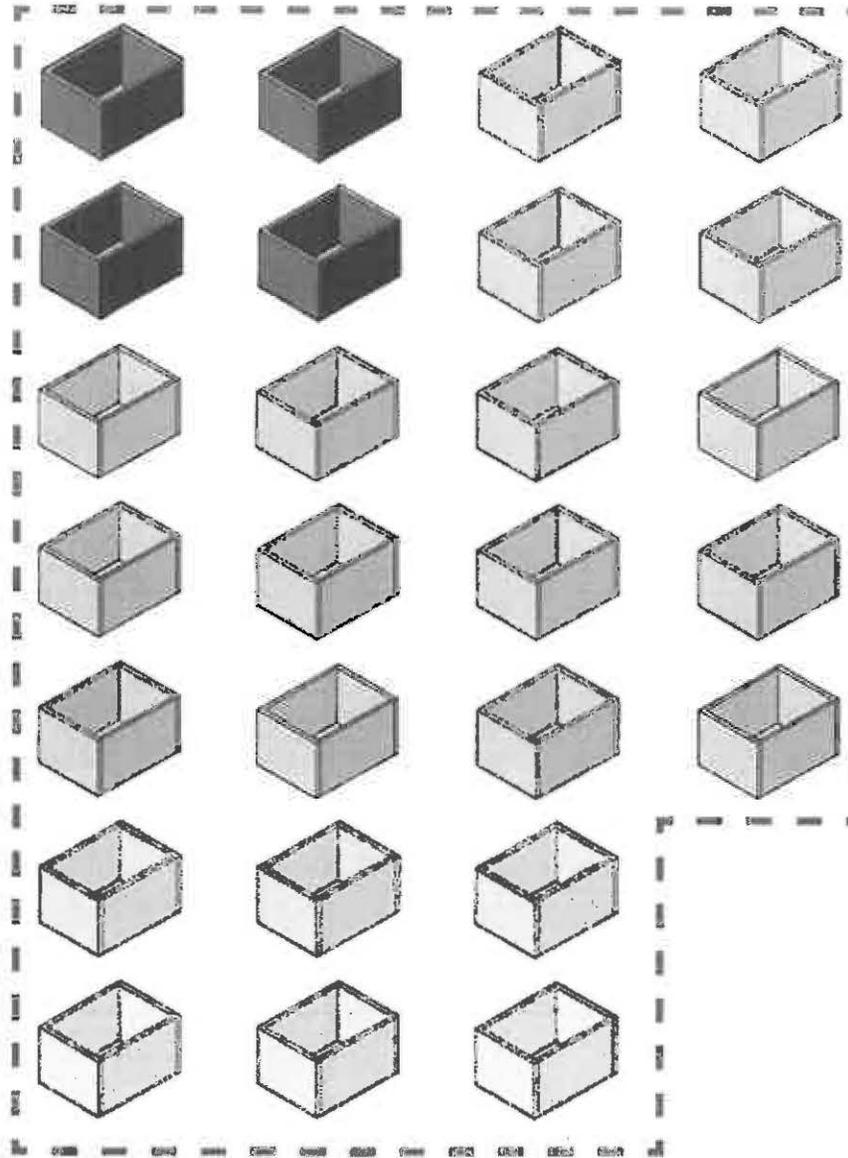
## Step 2: Define the Density Bonus Project

4 Affordable  
Units = **20%**

Total Possible  
Units:

% ~~Granted~~<sup>27</sup> for  
Density Bonus  
= **35%**

Density Bonus  
Units = 7



## Results:

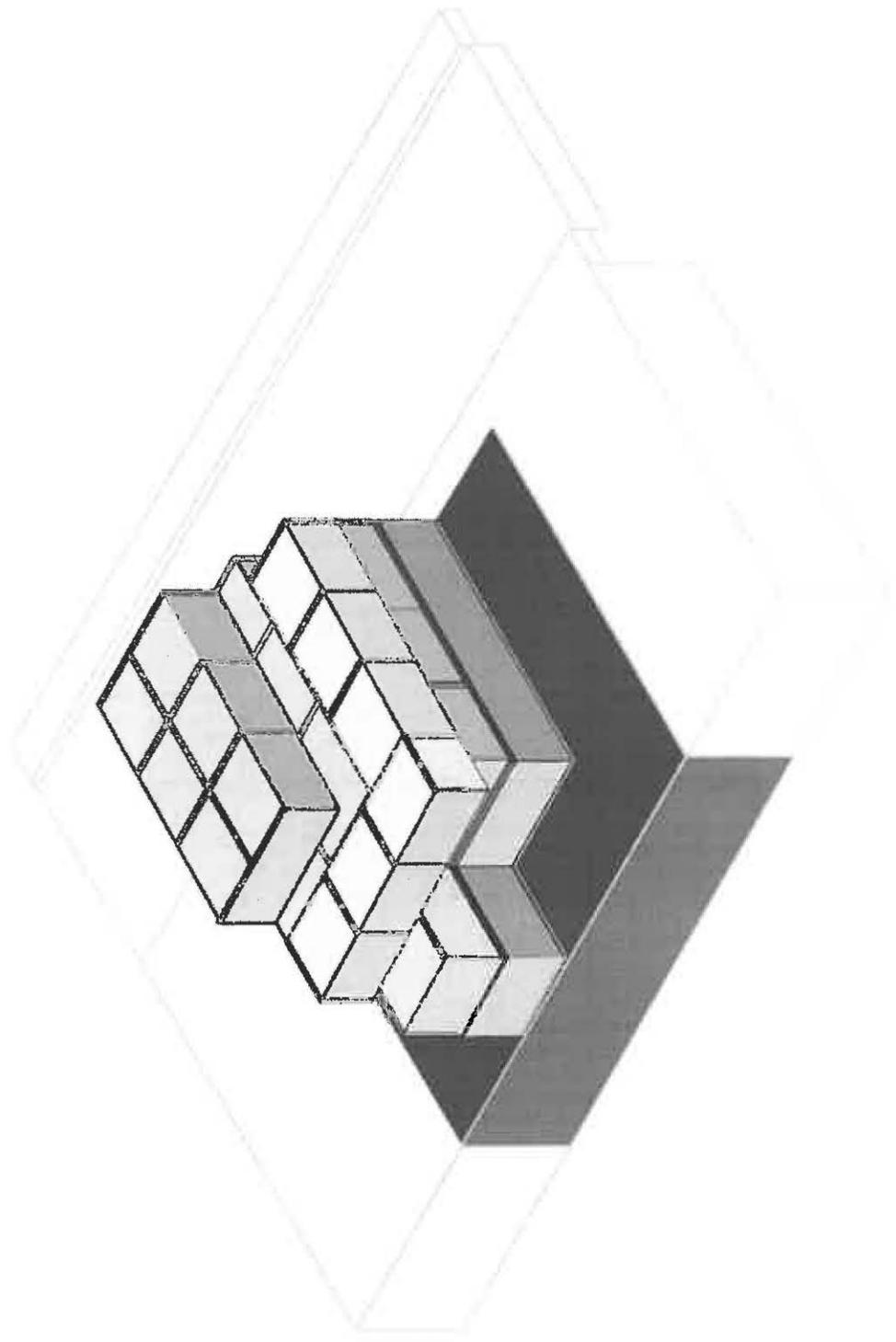
| STEP | ITEM                                  | VALUE         |
|------|---------------------------------------|---------------|
| 1.A  | Base Project Floor Area               | 40,000 sq. ft |
| 1.B  | Average Unit Size                     | 2,000 sq. ft  |
| 1.C  | Base Project Unit Count               | 20 units      |
| 2.A  | # of Affordable Units                 | 4 units       |
|      | % of Affordable Units in Base Project | 20%           |
| 2.B  | % Increase Granted for Density Bonus  | 35%           |
| 2.C  | # of Density Bonus Units              | 7 units       |
|      | Proposed Density Bonus Project        | 27 units      |

# Concession Analysis

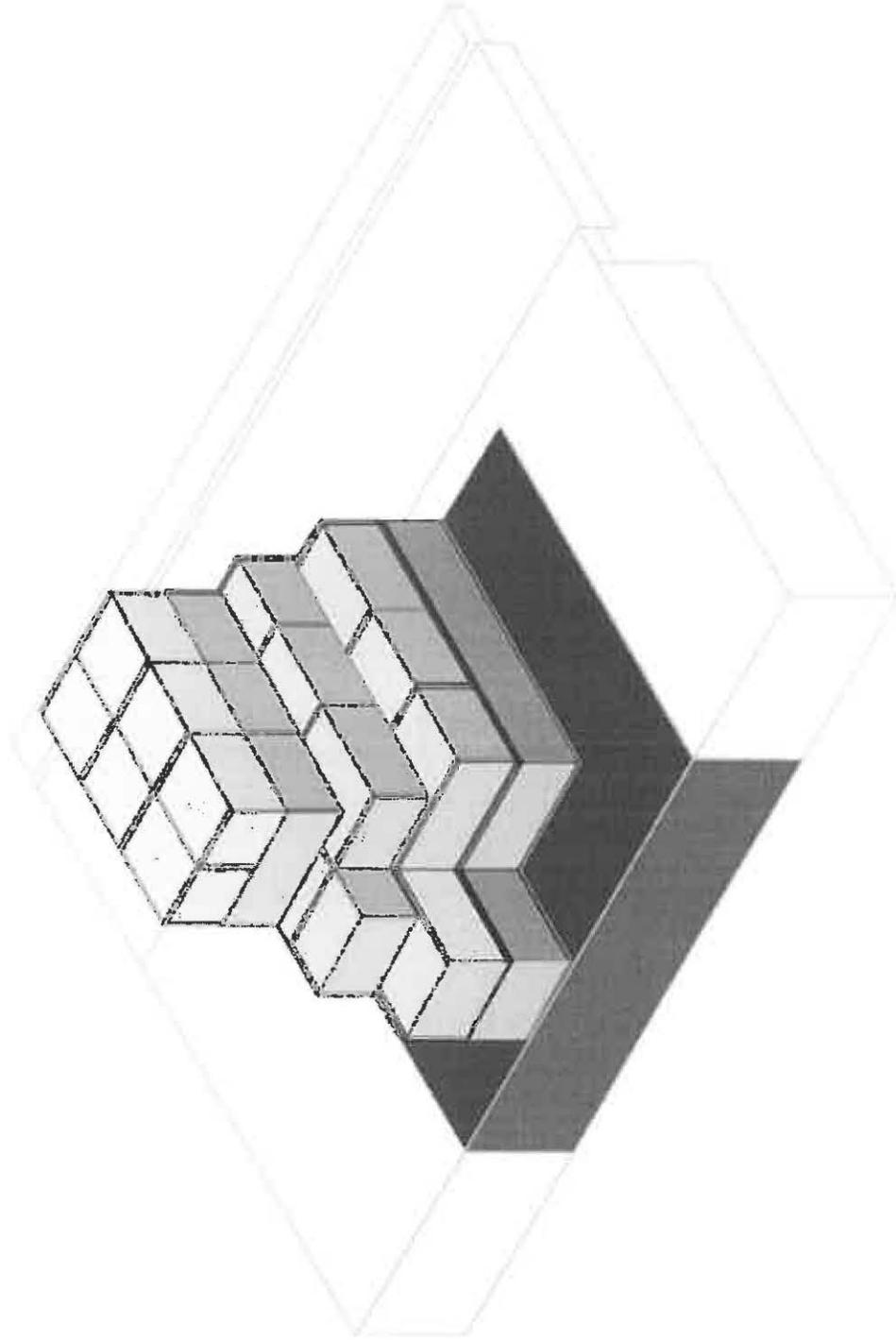
| Project Assumptions                       | Base Project (100% market rate) | 10% Very Low Income units | 35% Density Bonus | C. Density Bonus & Concessions |
|---|---------------------------------|---------------------------|-------------------|--------------------------------|
| Units                                     | 20 MR                           | 18 MR<br>2 BMR            | 25 MR<br>3 BMR    | 25 MR<br>3 BMR                 |
| Ceiling height                            | 8 ft.                           | 8 ft.                     | 8 ft.             | 9 ft.                          |
| Yield (NOI/ Costs)                        | 5.2%                            | 4.5%                      | 4.9%              | 5.2%                           |
| Return on Equity (Cash Flow/ Cash Equity) | 3.5%                            | 3.0%                      | 3.3%              | 3.4%                           |

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# Step 4: Waivers/Reductions granted (option 1)



# Step 4: Waivers/Reductions granted (option 2)



Slide 28

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oops -- undo my last instruction. Let's leave the third version here, in this slide, just as you had it originally. So sorry.

drs10  
donderdag, 4/10/2015

**From:** Kate Hinsche '20 [<mailto:khinsche@colgate.edu>]  
**Sent:** Thursday, July 27, 2017 9:27 AM  
**To:** Council; Town Manager; Planning  
**Subject:** Regarding the North 40

To the Town Council, Town Manager, and Community Planning Department:

My name is Kate Hinsche, a resident of 11 Kimble Avenue, and graduate of the Class of 2016 of LGHS. I attend Colgate University where I study Environmental Economics, and I write to you out of concern regarding the North 40 development, chronic traffic, and the Los Gatos Sustainability Plan. After sitting in on the North 40 Special Town Council Meeting, I realized that my age group has been largely underrepresented in this discussion, and this deeply troubled me. The future of Los Gatos is being decided without any say from the people who will live, work, and raise families here 20 years down the line.

First and foremost, I would like to say I am no stranger to the complications of commuter and beach traffic in Los Gatos. Living in a downtown neighborhood has meant finding alternate routes home on summer weekends and changing weekend routines. I've spent the summer commuting to my internship in Menlo Park in peak commuter hours. Listening to the testimony of the opponents of the North 40 development, I identified with their frustration. Their approach to solving this problem is, however, bogus, ineffective, and rooted in a misunderstanding of the problems facing Los Gatos and the greater Santa Clara County.

What the opponents of the North 40 fail to understand is how interconnected the housing shortage and chronic traffic are in the Bay Area. San Francisco and Santa Clara County have historically been developed with painfully low housing density, causing a severe housing shortage and steep price increases following the tech boom. The critical mistake in the 20 years since the first major growth in the local tech industry was the continuation of low-density, single purpose developments. This has spurred urban sprawl, placing people further and further from their jobs, transforming Silicon Valley into one giant commuter community, that just happens to also have one of the largest economies in the United States. The success of the industry here has, and will continue, to draw more and more people to the valley, increasing demand for housing, increasing prices for housing, sending people further from their jobs, and increasing problematic traffic. The root of the issue is not the number of people flocking to Los Gatos or the Bay Area, and it's not the companies whose maps send traffic into our downtown streets. The issue is low-density, single use development and insufficient public transportation.

Los Gatos is an atypical place, because it's a moderately sized town with an abnormally high proportion of college educated residents, and a direct tie to the technology industry that is 18% of the United States' GDP. In other words, Los Gatos is wealthy and predominantly liberal (69.7% Democrat). Looking at the political makeup of Los Gatos, as well as the education level of the residents, it is difficult to understand why the Town would be fighting a clearly beneficial development that helps to address the community's needs. However, with the knowledge that the average family income in Los Gatos, according to the 2010 census, is nearly \$160,000, it is clear that the opposition of the Town residents and the 2016 refusal of the North 40 project proposal are products of NIMBYism and classism. Efforts to maintain the exclusionary bubble of wealth and elitism here are shrouded in cries to protect the town's "character." Whether the stewards of this movement understand the reality of their work, it should not be tolerated nor enabled. Los Gatos has received all the benefits of the local industry, yet refuses to shelter any of the burden incurred by this rapid growth. The Town seems to have a victim mentality, but it is the Town's poor planning and development that have enabled this problem to balloon to this extreme degree. It is foolish to think that we can shirk any responsibility in addressing these matters, Los Gatos is no less a part of the problem than any of the many other cities that make

up the Bay Area. I urge you to take charge of this issue, turn this problem into an opportunity, and make our town the shining example of how the valley should be developed.

More than that, I urge you to address the concerns of the opponents of the North 40 project, regarding traffic, health and safety. Yes, the pollution in proximity to highways is detrimental to health. Yes, the traffic increases frequency of collision. Yes, adding more people means adding more cars, and subsequently more traffic. Stopping the North 40 project addresses none of these problems. I have read the Los Gatos Sustainability Plan, and I believe here lies the issue at the heart of everyone's concerns. In section 5, titled "Implementation and Monitoring," Measure TR-3, which calls for a public shuttle system with access to downtown, residential neighborhoods, and commercial and corporate areas, has been determined to have low cost-effectiveness, deeming it a project unworthy of pursuit. The perpetual traffic is also a pricey option, when you consider the value of lost productive hours to traffic, the environmental cost of additional GHG's being released into the atmosphere, and the consumer dollars lost when people can't reach local businesses. Los Gatos does have some public transportation, VTA routes 48 and 49. These buses, unfortunately, have extremely limited access to residential neighborhoods and only two stops in the primary commercial downtown region, with few connections to other VTA routes. Not only do these routes have limited scope, they run with such irregularity it makes it impractical to use them. Stops are only visited once an hour, an appalling rate considering effective transit has waits of no more than ten minutes. The only mass transit service that addresses the beach traffic is the Highway 17 Express, which has no stops in Los Gatos and limited service times. The majority of working Los Gatos residents are commuters, and if the Town wants to address their needs, then it needs to work in tandem with the other Bay Area communities to improve mass transit throughout the region. Refusing to do this means damning Los Gatos residents to remain car-dependent and maintaining one of the many economic barriers causing inequality in the Bay Area. Ensuring that every resident has access to easy-to-use, inexpensive, public transit seems worth the price, considering the other option is to continue the cycle of gridlocked traffic.

Copied below are links to articles from the New York Times covering the challenges Los Gatos grapples with, I hope you give them a read.

<https://www.nytimes.com/2015/08/02/us/bay-areas-disjointed-public-transit-network-inspires-a-call-for-harmony.html>

<https://www.nytimes.com/2016/07/04/business/how-anti-growth-sentiment-reflected-in-zoning-laws-thwarts-equality.html>

All the best,

Kate Hinsche

**From:** susan buxton [mailto:ssbuxton@yahoo.com]  
**Sent:** Thursday, July 27, 2017 10:04 AM  
**To:** Marico Sayoc; Rob Rennie; BSpector; Steven Leonardis; Marcia Jensen  
**Cc:** Joel Paulson; Robert Schultz  
**Subject:** North 40

Dear Mayor, Council and Staff,

I have attached two documents produced by Leila M. Moncharsh, J.D., M.U.P., of the Law Firm of Veneruso & Moncharsh for your reconsideration. Ms. Moncharsh was hired by the community to create proposed findings. These two documents were submitted prior to the Town's hearing, and to the surprise of many, were not included in the findings provided by the Town. I realize that received these items before the June 20th closed session, however, they were not included in the desk items.

I do understand that you have an incredible amount of material and testimony to consider, but I would hope that you would review these findings. Ms. Moncharsh has been a land use attorney for over 20 years, and also has a master's degree in urban planning, and I feel it would irresponsible to ignore her expertise.

Thank you for your time and dedication to the Town of Los Gatos.

Sincerely,

Susan Buxton  
Los Gatos, CA



DONNA M. VENERUSO (d.'09)  
LEILA H. MONCHARSH

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September 2, 2016

Los Gatos Town Council  
110 E. Main Street  
Los Gatos, CA 95030

Re: Architecture and Site Application S-13-090; Vesting Tentative Map M-13-014 – North 40 Specific Plan Phase 1

Dear Mayor, Vice Mayor, and Council Members:

This is to request that the Town staff provide the draft findings to the public no later than noon on Monday, September 5, 2016, even though it is a holiday. We are quite concerned that staff's recommended findings be as inclusive as possible in the event that the developer chooses to pursue litigation, challenging the Town Council's well-reasoned decision to deny the application. We are seeking an opportunity to submit comments to your Council regarding those draft findings.

While staff has done an incredible job with a very large and complicated project, it is unlikely that a court would view this project the same way as staff and is more likely to view it by applying the typical standard of review for land use cases. (See Desk Item H, p. 2.) The court will not re-try this land use matter and decide what it would have done had it been allowed to make the decision you made, but instead will look carefully at your Council's findings and whether they are supported by evidence in the record. The court's

function is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies, whether the city officials made appropriate findings on this issue, and whether those findings are supported by substantial evidence.

(*Naraghi Lakes Neighborhood Preservation Association v. City of Modesto* (July 1, 2016) <<http://www.courts.ca.gov/opinions/documents/F071768.PDF>>, p. 10 - citations and quotation marks omitted - cited in my letter, dated August 30, 2016.)

Therefore, your findings are extremely important and should be given the utmost attention with an understanding of how the court will process them.

Furthermore, contrary to the staff report, there is no legal basis in statutes or case law supporting staff's position that a court would view low-income seniors as half of one category (low-income) and half of the other category (seniors) in determining whether the project qualified for *any* density bonus. The human beings living in the senior housing are not divisible, the policy

behind the density bonus law is intended to benefit them, and no reasonable judge would turn that policy on its head by faulting your Council for refusing to subject seniors to living conditions with no accessibility to basic resources. It is also highly unlikely that a court would think your Council abused its discretion by refusing to accept a promise of future accessible resources in project site retail establishments that are not part of the project, have no conditions of approval requiring them, and that may never come into existence. Accordingly, your findings should include that the project does not provide accessibility to necessary resources for low-income seniors, the only population included in the project.

Moreover, even if the Town viewed the project as serving low-income adults, and could divorce the "senior" description, we would be talking about very different issues than with senior low-income adults. Instead, we would be discussing the size of the units for low-income families under the state Fair Housing laws and substantially more parking than is included in the current project. Therefore, the findings need to include that your Council viewed the underprivileged population as low-income seniors and did not consider other categories such as low-income families.

Mayor Spector handled staff's claim that various General Plan and Specific Plan policies were "subjective, not objective." We contended that this test does apply when there is a finding that the project is in compliance with the General Plan and Specific Plan, not when it is *inconsistent* with them, and we cited relevant parts of the applicable code. Your Council should make sure to include in its findings *all* of the features of the project that are inconsistent with these two documents and specify *all* of the relevant policies.

It is not true, as staff contends, that your Council may only consider the Specific Plan because it expressly relies on the General Plan. The Specific Plan contains the following language:

The purpose of the North 40 Specific Plan is to implement the Town of Los Gatos General Plan and to comprehensively plan for future development in the Specific Plan Area. The Specific Plan will be a regulatory tool that the Town of Los Gatos will use to guide future development. While the General Plan is the primary guide for growth and development in Los Gatos, the Specific Plan focuses on the unique characteristics of the Specific Plan Area and customizes the planning process and land use regulations to reflect the Town Vision Statement and Guiding Principles for this area.

(Specific Plan, *Introduction*, p. 1.)

The Town housing element is in the General Plan, not the Specific Plan. While it is true that if there is a conflict between the General Plan and the Specific Plan, the latter controls. We did not notice conflicts between these two plans in the context of the proposed project. In the findings, your Council should include as many goals and policies from both documents as you decide apply to the proposed project. (We did not include in our letter any policies that were purely advisory, normally identified by the word "should.")

There are bills before the state legislature that deal with affordable housing and more may be considered in 2017. There also have been amendments to existing density bonus laws over the last few years. Your findings, however, should not be guided by speculation about future legislation or by horror stories concerning courts. After 38 years of law practice, most of it spent in courtrooms, I certainly have run into judges who were unreasonable, illogical, and careless. However, the vast majority of judges are competent, hard-working people who try their very best to be fair to litigants. Santa Clara Superior Court has an excellent reputation for highly skilled judges. While there are risks in any litigation, I would not expect that a Santa Clara judge hearing this matter will come down hard on a town council of five people who have given so much attention to a development project as your Council. The atmosphere of changing laws, new laws, poorly drafted statutes, and politics pushing high density housing have been just a few of the challenges facing your Council. Judges understand this kind of quagmire facing local decision-makers and are not likely to usurp your role or handle the case punitively.

At this point, the best service your Council can provide to the citizens of Los Gatos is to carefully go over the findings and make sure that they are clear and complete for the court's consideration. Helping the court fully understand your thinking process through your findings is the best road towards a good result.

Thank you for considering our comments.

Very truly yours,



Leila H. Moncharsh, J.D., M.U.P.  
Veneruso & Moncharsh

LHM:lm

cc: Ms. Dodson



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August 30, 2016

Los Gatos Town Council  
110 E. Main Street  
Los Gatos, CA 95030

Re: Architecture and Site Application S-13-090; Vesting Tentative Map M-13-014 – North 40 Specific Plan Phase 1

Dear Mayor, Vice Mayor, and Council Members:

Our client, Barbara Dodson, requested that we submit comments to your Council in response to the Applicant's attorney letter of July 7, 2016. Specifically, she requested that we address the affordable housing legal issues and whether the proposed project complies with the Specific Plan. I am a land use attorney with a master's degree in urban planning. Over the last 20 years, I have occasionally analyzed projects designed for senior housing and have often analyzed projects for consistency with general plans. I came to four conclusions:

1. There is insufficient evidence in the record to support a finding that the Applicant is providing senior housing because the proposed housing does not provide accessibility
2. Because the proposed project site, without a shuttle service, lacks accessibility to necessary resources for low-income seniors, and because the Applicant has not proposed any other housing that qualifies for density bonuses, the Council should deny the project application
3. The proposed project is inconsistent with the General Plan and the Specific Plan in ways described by the Planning Commission. Further, because the Applicant is not providing senior housing with necessary accessibility, the project fails to satisfy the Town's "unmet needs" as required by the Specific Plan
4. The threats of a lawsuit by the Applicant are without basis, and overlook the standard of review that the superior court would apply to its lawsuit

**1. The Proposed Senior Portion of the Project Does Not Comply with the Legislature's Policies Defining "Senior Housing"**

The proposed project includes senior housing with 49 units for low-income seniors and 1 unit for a manager. The Applicant asserts that it is entitled to the density level in its entire project "by right" and that the Town Council has no discretion and therefore, must grant the requested permits.

It is true that in the event the Applicant provides low-income senior housing in its project, it is entitled to density bonuses.<sup>1</sup> The state policy defining “senior housing” is found in the state density bonus statute<sup>2</sup> and in Civil Code section 51.3, a copy of which is attached to my letter as Exhibit A for your convenience.

(a) The Legislature finds and declares that this section is essential to establish and preserve specially designed accessible housing for senior citizens. There are senior citizens who need special living environments and services, and find that there is an inadequate supply of this type of housing in the state.

The policy requires that for housing to qualify as “senior housing,” it needs to provide accessibility, a special living environment, and services that will accommodate seniors. For example, two floors of apartment units in the middle of a 44-acre lot with nothing around it would not meet the need for senior housing. Similarly, it would be difficult for the Council to conclude that a homeless shelter would qualify, either.

At the Town Council hearing on August 11, 2016, Council member Sayoc questioned whether the seniors would be isolated over the ground floor market hall. Her questions were directly on point with the state’s policy concerning accessibility of housing and services for seniors. However, as we reviewed the record it was very difficult to find specifics from the documents and statements made during hearings by Eden’s representative. The explanations consisted of vague generalizations—Eden would provide “services” or “would use its network” or would “provide a stimulating program for the seniors.”

The lack of specific information about the accessibility and services that are contemplated for the senior population was perplexing because the site is not one that in our experience would be developed for senior housing. Generally, municipalities encourage developers to place senior housing along transit-oriented corridors where seniors can fully participate in their communities. The General Plan Transportation Element for Los Gatos is consistent with the practice of requiring public transit for certain population groups.<sup>3</sup> None of the material or statements by Eden answered the question whether the seniors living above the market hall would be able to meet daily needs such as obtaining food, going to hospital appointments, participating in the

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<sup>1</sup> Government Code section 65915, subdivision (b)(1)(C). We understand that the density bonus was calculated based on the category for low-income persons.

<sup>2</sup> Government Code section 65915, subdivision (b)(C)

<sup>3</sup> See Policy TRA-8.4: Coordinate with appropriate agencies to provide transit service in the Town for seniors . . . low income people, the physically disabled, and other groups with special needs.

Town's senior centers, accessing hairdressing services, or in other ways have services available to them. The only clear statement was that neither the developer nor Eden would be providing any shuttle service. While Civil Code section 51.3 does not require extraordinary or lavish services, some services are essential to conform to the state's policy and definition of "senior housing."

To analyze the accessibility issue, Ms. Barbara Dodson went to the perimeter of the proposed project site (since unfortunately citizens are not allowed into the project site since it is considered private property) and imagined she was a "senior" living in very low-income housing. She then carefully researched the claim made by Eden that there would be "[e]asy walkability to goods and services complet[ing] the ease of what could otherwise be a difficult transition."<sup>4</sup> It became immediately apparent that there were inadequate resources within walking distance, especially for those seniors with any disability or those seniors co-residing with disabled children.<sup>5</sup> The roadways are not safe, especially in crossing at intersections and the goods and services are too remote from the project site.

Ms. Dodson then turned her attention to bus service, measured the distance to the nearest essential services, and attempted to locate transit service. She found that while it would be possible to find a bus stop in front of the project site, when the bus arrived back at the bus stop across from the project site, there would be no crosswalk. Therefore, the seniors would need to go to intersections where they would have to cross many lanes of heavy traffic. Ms. Dodson also evaluated availability of other transportation resources by calling the services, which also proved unsatisfactory. She provides the outcome of her investigation in her letter, dated August 28, 2016.

The lack of accessibility and services in this senior housing project was not a topic that only Ms. Dodson noticed. Tom Picraux, the chairperson for the Los Gatos Community and Senior Services Commission spoke before the Planning Commission on July 12, 2016.<sup>6</sup> He raised the very same issue of whether the developer or Eden would be required to provide the

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<sup>4</sup> March 30, 2016 Planning Commission hearing and repeated in Ms. Dotson's letter delivered to the Council on August 29, 2016.

<sup>5</sup> A "qualified permanent resident" who would be eligible to live in the senior housing above the market hall would include a disabled person who is a child or grandchild of the senior citizen and needs to live with the senior. (Civil Code section 51.3, subdivision (b)(3).

<sup>6</sup> His comments begin on the video around 5:54.

type of services necessary for very low-income seniors. Specifically, he mentioned healthcare, nutrition, and case management, “or will this be something that falls on the backs of the Town?” He made it clear that his commission has attempted to meet these needs for Los Gatos seniors, but implied that the services for the North Forty very low-income senior residents needed to be provided by Eden.

During the August 11, 2016 hearing before the Town Council, a question was asked about how the developer and Eden would handle ventilation in the senior housing above the market hall. The answer, not surprisingly, was that air conditioning and ventilation units (HVAC) would be installed and located on the roof. Yet, we do not see anything in the proposed conditions regarding maintenance of these essential units which can be very expensive to maintain over time. This is a necessary service that very low-income seniors cannot obtain on their own.

Even something so simple as assuring that seniors waiting for a bus are provided with cover during winter weather has not been addressed, although it is a requirement in the General Plan. TRA-8.8 states that where feasible and appropriate

all new projects that are near existing transit services and/or destinations such as shopping areas, community centers, *senior* housing, and medical facilities shall be required to provide covered and partially enclosed shelters consistent with Santa Clara Valley Transportation Authority (VTA) Standards that are adequate to buffer wind and rain, and have at least one bench at each public transit stop.

The General Plan also requires that the Town make “land use decisions that encourage walking, bicycling, and *public transit use*.” (TRA-9.1 - emphasis added.)

The overall picture of the senior housing component is that little to no planning went into it other than developers seizing an opportunity to use disadvantaged seniors as a way to greatly increase the net return on their investment. That was never part of the Legislature’s policy or intent behind the density bonus benefits. The developer and Eden have not offered evidence that the project includes “*accessible* housing for senior citizens” and that it provides them with the “the special living environments and services” that they need. (Civil Code section 51.3, subdivision (a).) In reviewing the recent letter from the Department of Housing, it is obvious that this agency was unaware of the accessibility problems.

## **2. The Council Should Deny the Project Application**

As shown in section 1, above, the Applicant was not entitled to a density bonus because its project does not meet the definition of “senior housing” in Civil Code section 51.3(a). As an additional reason for why the Town Council should deny the project, we refer the Council to the state code section allowing it to deny projects benefiting from density bonuses under

circumscribed situations.<sup>7</sup> (The staff reports contain an abbreviated version of the state code, presumably based on the Town's ordinance implementing the state density bonus law. However, any conflict between the Town's implementing ordinance and the state density bonus law could cause a court to find fault with your Council. Therefore, the better practice is to use the state density bonus law itself when deciding whether to grant or deny a density bonus to a developer.)

The state law allows your Council to deny the application, which includes housing for very low-income seniors if three prongs are met: (1) The project would have a specific adverse impact on health or safety; (2) there is no feasible method to satisfactorily mitigate or avoid the specific impact without rendering the project unaffordable for the seniors or financially infeasible; and (3) the specific adverse impact is 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." Here is the entire text of the criteria your Council is required to follow:

The development project . . . as proposed would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low and moderate-income households or rendering the development of the emergency shelter financially infeasible. As used in this paragraph, a "specific, adverse impact" means 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.<sup>8</sup>

The evidence in the record supports all three prongs of the test for denial of the density bonus. (1) The senior housing component of the project would have an adverse impact on health and safety for the public. The seniors living in the project would be part of the "the public." The isolation of the seniors above the market hall with no provisions for them to obtain necessary goods and services adversely affects their health and safety. The failure in the conditions of approval to require a shuttle service or maintenance of the ventilation system is also a threat to their health. Requiring them to use public transportation that would involve crossing multiple

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<sup>7</sup> See Government Code section 65589.5, attached as Exhibit B.

<sup>8</sup> Government Code section 65589.5, subdivision (d)(2).

lanes of heavy traffic is an adverse impact on their safety and on the safety of drivers attempting to deal with seniors slowly walking through many lanes of traffic.

(2) There is no feasible way to satisfactorily mitigate the adverse impacts listed in section 1, above, without rendering the project unaffordable for the seniors or financially infeasible for the developer for two reasons: a. there is no way to move the buses around or change the numerous lanes of traffic into fewer lanes. A bridge over so many lanes of traffic so that the seniors could safely get across the street from the bus stop to the project would not be financially feasible. Nor is it likely seniors, especially those who are disabled, would be able to use the bridge without an elevator at both ends. b. Through its attorney the developer has made it clear that it is unwilling to do anything further with this project other than discuss the color of the paint on the buildings or make minor changes that can be approved by the Town's planner. It has entered into a streamlining agreement with September 7, 2016 as the final date for the Town's decision and after that, it prefers to sue the Town rather than mitigate the health and safety issues.

(3) The adverse impacts are significant because they deprive the seniors of the ability to access necessary goods and services, and ability to participate in the greater community outside the project units. It is quantifiable and direct because any planner can verify the information in Ms. Dodson's letter. The impacts she describes are also objectively verifiable by a Town traffic engineer. Also, a Town engineer can objectively verify that the senior housing requires a ventilation system and there is no provision in the conditions of approval for maintenance of it. The impacts described in section 1, above violate the state policy for "accessible" senior housing with adequate services under Civil Code section 51.3(a). The impacts described in section 1 are based on the roadway and public transportation conditions that existed when the developer's application was deemed complete.

Therefore, the Town should deny the project application because it necessarily includes "adverse specific impacts" that cannot be mitigated.

### **3. The Town Council Should Deny the Permit Application Because the Project Is Inconsistent with the General Plan and the Specific Plan**

In its July 7, 2015 letter, the Applicant's attorneys contend that the Town cannot legally deny its project application since the project qualifies for the density bonus. Instead, it must follow the directives of Government Code section 65589.5, subdivision (j), which assumes that the project *complies* with the Town's General Plan and Specific Plan. Of course, that has been the Applicant's position all along-that it has developed a project that not only qualifies for a density bonus, but also complies with the General Plan and Specific Plan. The Planning Commission, after three days of lengthy hearings, disagreed. So, do we. The Town Council

should reject the approach that it cannot deny the application based on inconsistency with its General Plan and Specific Plan for several reasons:

As discussed in section 1, above, the proposed project is not entitled to a density bonus because it fails to provide senior housing as defined in Government Code section 51.3, subdivision (a). The evidence in the record demonstrates that accessibility to necessary resources for the very low-income seniors in the senior housing would be inadequate, the senior housing does not constitute a liveable environment for seniors, and that the Applicant refuses to do anything to mitigate the accessibility problems, instead preferring to pursue litigation

The Town is legally required to deny projects that are inconsistent with its General Plan or its Specific Plan. The Legislative policies requiring municipalities to develop and follow General Plans must be harmonized with the density bonus policy, especially under the facts here where the housing does not provide accessibility for seniors. Under Government Code section 65589.5, subdivision (d)(5), the Town may deny the project for inconsistency with the General and Specific Plans. None of the exceptions in this subdivision apply to this project or override the requirement in Government Code section 65589 that the local agency comply with state policies, other than those promulgated to encourage affordable housing

Even under the standard that the Applicant relies upon, contained in Government Code section 65589.5, subdivision (j), the Town can and should legally deny the application for the permits

We were unable to find a legal case where a density bonus was sought solely for the purpose of overriding the local agency's General Plan to increase market-rate housing, and was unrelated to improving the lives of underprivileged citizens. However, *Carson Harbor Village, LTD v. City of Carson* (2015) 239 Cal.App.4th 56 (*Carson*)<sup>9</sup> is instructive. There, the superior court considered the denial of a permit application to convert a mobile home park from a rental facility into resident-owned lots. The opponents claimed that the application was a "sham," as might be suggested here, designed to get around the City's General Plan and ordinances. In *Carson*, the application was allegedly designed to get around local rent control ordinances. (*Id.* at pp. 60-61.) At first, the court of appeal in *Carson* ruled that the City could not deny the application based on inconsistencies between the proposed project and the General Plan, but then reversed itself. The City had denied the permit since the proposed conversion

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<sup>9</sup> Attached as Exhibit C.

was not bona fide because it was unlikely that many of the low income tenants living in the park would agree to buy their lots, the tenant survey improperly gauged support for the incentives, not the conversion, and the required tenant impact report did not include information requested about the wetlands and the displacement effect on current tenants. The City alternatively denied the application because it was inconsistent with its general plan's affordable housing and open space elements and posed a risk to the wetlands and its wildlife. (§ 66474, subds. (b) & (e).)

(*Carson, supra*, at p. 61.)

The superior court ruled against the City on the bona fide issue and held that inconsistency with a local agency's General Plan was an improper ground to deny the proposed conversion. Further, there was no evidence the proposal was inconsistent with the City's General Plan. (*Carson, supra*, at p. 62.) (Sound familiar with the facts now before the Town Council?)

The court of appeal reversed the superior court, first noting the priority that local agencies must give to their General Plan, a point that here Mayor Spector amply demonstrated during the hearing of August 16, 2016. It is worth quoting the court's statement, which contains ample citations to California Supreme Court cases. We have left out these citations to make the statement more readable:

All local governments must have a comprehensive and long-term general plan for the development of land within their boundaries. Acting much like a land-use constitution, it is the basic charter governing the direction of future land use within a locality. The propriety of virtually any local land use decision depends upon its consistency with the general plan.

(*Carson, supra*, at p. 62 - citations and quotation marks omitted.)

The court went on to discuss all of the competing legislative policies involved in the matter. As here, the proposed conversion implicated the Subdivision Map Act, which was "designed to promote orderly community developments . . ." Like the Density Bonus Law, the Map Act included provisions for denying the application for the map, including "inconsistency with an applicable general plan." Other competing policies involved the wetlands under the Coastal Act that conflicted with the policies of the Mello Act which included that "[t]he availability of housing is of vital statewide importance;" and "decent housing and a suitable living environment for every Californian... is a priority of the highest order." (*Carson, supra*, at p. 67.)

Furthermore, quoting a California Supreme Court case<sup>10</sup> the court noted that the Map Act includes a provision that nothing in the Act affects a local agency's obligations to comply with applicable state and federal laws. (*Carson, supra*, at p. 67.) Again relying on the Supreme Court's directives, the court of appeal concluded that the Map Act was intended to operate in conjunction with other state laws and that the lower court had been required to "harmonize" the competing state policies and to reconcile inconsistencies between "statutory provisions wherever possible and, absent an express declaration of legislative intent, to avoid implied repeals unless the conflicting provisions were fatally irreconcilable and inconsistent." In the remainder of the *Carson* case, the court found sufficient evidence in the record to support the City's conclusion that the proposed conversion was inconsistent with the General Plan. (*Carson, supra*, at pp. 71-80.)

Here, the Applicant overlooks the very language that allows the Town Council to consider other state policies, including the state law requirement that it follow its own General and Specific Plans. Instead, the Applicant just relies on Government Code section 65589.5. However, it overlooks the preceding applicable code section—65589.<sup>11</sup> The relevant subdivisions state:

§ 65589. Construction of article:

(a) Nothing in this article shall require a city, county, or city and county to do any of the following: . . .

(c) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government with respect to measures that may be undertaken or required by a local government to be undertaken to implement the housing element of the local general plan.

(d) The provisions of this article shall be construed consistent with, and in promotion of, the statewide goal of a sufficient supply of decent housing to meet the needs of all Californians.

Here, the "elephant in the room" is interpreting Government Code section 65589.5 as to whether the Town can legally deny the permits given inconsistency with the General Plan. We agree with the Town's outside counsel—the section that seemingly allows the Town to deny the

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<sup>10</sup> *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783.)

<sup>11</sup> A copy is attached as Exhibit D.

permits on that basis is murky at best and without any legal precedent.<sup>12</sup> We offer some additional comments and are willing to take a stab at a prediction, based on the discussion above concerning competing policies.

To review for your Council: Government Code section 65589.5, subdivision (d) does not allow a local agency to disapprove a *housing development project* unless it “makes written findings, based upon substantial evidence in the record, as to one of the following:”, which is then followed by five instances when a local agency may deny permits for a proposed project that contains affordable housing for very low-income households. Government Code section 65589.5, subdivision (d)(5) allows the Town to deny the permits if it finds the that the proposed project is “inconsistent with . . . the jurisdiction’s . . . general plan land use designation as specified in any element of the general plan . . .” However, this subdivision is followed by subdivision (d)(5)(A), which does not allow the Town to deny or conditionally disapprove a *housing development project* for very low-income people if the proposed project site has been identified in the Town’s housing element as one suitable or available for very low-income households.

The logical next step is to look at the definition of *housing development project* and as your outside attorney explains, the definition is problematic under subdivision (h)(B) as to what constitutes “Mixed-use developments.” We would add that subdivision (h)(3) defines *housing for very low-income households* as “at least 20 percent of the total units shall be sold or rented to lower income households . . .” The proposed project does not meet that definition and arguably does not meet the definition of a Mixed-use development, either.

Moreover, we note that under the code section, the test for a local agency to deny a permit is more relaxed if the proposed development complies with the General Plan than it is if it does not comply with it. Government Code section 65589.5, subdivision (j) only requires that if a local agency decides to deny a permit even though the proposed project is consistent with the General Plan, it must make findings that the project would have a specific, adverse impact on public health and safety and that there is no feasible method to satisfactorily mitigate or avoid that impact. Basically, the test in subdivision (j) is the same as in subdivision (d)(2), which we describe in section 1, above, and which does not contain nearly as many qualifiers for a local agency to deny a project as subdivision (d)(5)(A). The test for whether a local agency can disapprove a housing project should be more stringent if the proposal is inconsistent with the General Plan than if it is consistent with it. Instead, if subdivision (d)(5)(A) applies, the test is less stringent to the project here that inconsistent with the General and Specific Plans.

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<sup>12</sup> See, letter of outside counsel, attachment 37, pp. 7-8.

Our prediction is that the courts will not struggle with sorting out the pitiful language in Government Code section 65589.5, but instead will revert to the time-honored practice of “harmonizing” the state’s policies between a local agency’s obligation to enforce its general plan and its obligation to provide affordable housing to very low-income seniors. Most likely, courts will continue to require that local agencies grapple with these competing policies, make a decision about granting or denying permits, write up the findings, and make sure that there is substantial evidence to support them!

Accordingly, the Town Council should find that substantial evidence supports that the proposed project is first, inconsistent with the state policies to promote accessible, “decent housing” to meet the needs of seniors and second, that in other regards it is inconsistent with both the General Plan and the Specific Plan.

There is adequate record that allows the Town Council to find that the proposed project is inconsistent with its General Plan and Specific Plan. As discussed in section 4, *infra*, the court expects the Town Council to utilize its goals and policies, keeping in mind that the General Plan and Specific Plan will contain a mixture of competing policies. It is up to the Town Council to look at the proposed project and decide which policies to apply to it.

The recommendations from the Planning Commission were sound, with particular mention of the work completed by Commissioner Hudes. He not only participated in drafting the Specific Plan, but verified facts and confronted the developer with questions before arriving at what the commission believed was a fair resolution. For example, one of the “Guiding Principles” in the Specific Plan was that the “The North 40 will embrace hillside views, trees, and open space.”<sup>13</sup> He went to the site and looked for himself at the story poles and the plans. Commissioner Hudes then gave the developer’s expert an opportunity to rebut the concern that the proposed project was inconsistent with Policy O1, p. 2-11—“Promote and protect views of hillsides and scenic resources.” He explained why he disagreed with the expert, giving the developer another opportunity to respond. Eventually, the commission listed this inconsistency as one of its reasons for the recommendation to deny the permit.

The Planning Commission determined that the proposed project was inconsistent with Policy 3.2.6, p. 3-8 -- “Provide architectural elements, detailing and ornament to add richness and variety to building facades and facade depth and detail.” This policy was also part of the Town’s “Guiding Principles” and required the project to “look and feel like Los Gatos.” There was quite a bit of debate about whether the vision was too subjective and not objective enough to qualify for an inconsistency finding. However, as discussed below in section 4, the Specific Plan can

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<sup>13</sup> Specific Plan, p. 1-1.

enforce its vision and policies. The community came to hearings with many photographs demonstrating the architectural elements consistent with Los Gatos. The record amply demonstrated that the proposed project was “Anywhere Suburbia, U.S.A.” as opposed to the look and feel that should have been accomplished by following Policy 3.2.6 and the vision.

The record also supports a finding that the proposed development was inconsistent with Policy LU4, p. 2-2–“Commercial development within the Specific Plan Area shall be complementary to Downtown through careful control of uses and permitted square footage . . .” Policy LU6, p. 2-2 required that the commercial uses in the North 40 serve the residents and adjacent neighborhoods. There were several downtown commercial owners who explained that the proposed project threatened to cause leakage from the downtown into the North 40, crippling both commercial areas of Los Gatos. Commissioner Hudes inquired about the Specific Plan’s requirement that the developer obtain an Economic Impact Study<sup>14</sup> to address this issue and the developer produced the author of that report. The commission concluded that the study was “flawed” because it did not discuss the key issue of leakage from the Downtown commercial uses.

Another Guiding Principle was that the North 40 will address the Town’s residential unmet needs.<sup>15</sup> As shown in section 1, above, it does not meet the needs of very low-income seniors because necessary resources for the very low-income seniors would be inaccessible. It also did not meet the Town’s needs for housing that would accommodate market-rate seniors because the entire project contains multi-story buildings with no elevators, other than in the very low-income senior housing over the market hall.<sup>16</sup>

The proposed project is also inconsistent with the General Plan Housing Element as it relates to seniors and very low-income seniors. Goal HOU-4 on page 36 states “Ensure that all persons have equal access to housing opportunities. Policy HOU-4.1 states, “Support housing programs that protect individuals’ rights.” Because of the inaccessibility issues described above in section 1, the proposed project is inconsistent with several other General Plan Goals and policies on pages 39-40: Goal HOU-5 “Retain and expand affordable housing opportunities for seniors.” Policy HOU-5.2 states, “Allow and encourage small-scale living facilities of two to six seniors that may include nursing care services that can be integrated into existing neighborhoods

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<sup>14</sup> Specific Plan 2.4.2, p. 2-6

<sup>15</sup> Specific Plan, p. 1-1

<sup>16</sup> Specific Plan, p. C-2

as infill development.” And, Policy HOU-5.3 requires: “Work with existing senior lifestyle living and assisted living facilities in Los Gatos, and support the development of new senior housing that includes continuum of care facilities within the Town.”

#### **4. The Applicant’s Threat of A Lawsuit Is Greatly Exaggerated**

We agree with the Town’s outside lawyer that the Town should follow the directives of Government Code section 65589.5 regarding granting or denying permits for proposed affordable housing. And its list of pending or past cases in superior court does contain a few examples where the court took measures to correct problems with local agencies not complying with one or another of its requirements. However, the list also shows that past litigation has followed the typical pattern of courts leaving much of the decision-making to local agencies. The court does not substitute its judgment for that of the local agency by second-guessing whether a project is consistent or inconsistent with a General Plan. That decision is left up to the local agency with a presumption that its decision is correct.

On August 16, 2016, Council member Jensen presented a slide show to demonstrate that the *intent* of those who drafted the Specific Plan and the Council that approved it was consistent with various aspects of the proposed project. However, that is not the test utilized by the court. Instead, it applies the substantial evidence test and resolves

reasonable doubts in favor of the City’s finding and decision. (Ibid.) The essential inquiry is whether the City’s finding of consistency with the General Plan was reasonable based on the evidence in the record. As long as the City reasonably could have made a determination of consistency, the City’s decision must be upheld, regardless of whether we would have made that determination in the first instance. Generally speaking, the determination that a project is consistent with a city’s general plan will be reversed only if the evidence was such that no reasonable person could have reached the same conclusion.

*(Naraghi Lakes Neighborhood Preservation Association v. City of Modesto (July 1, 2016) <<http://www.courts.ca.gov/opinions/documents/F071768.PDF>>, p. 10 - citations and quotation marks omitted (Naraghi).)*<sup>17</sup>

The same standard of review applies when a local agency determines that a proposed project is *inconsistent* with its General or Specific Plan. (*Carson, supra*, 239 Cal.App.4th 56, at p. 62 [“... [W]e examine the entire record to determine whether the City’s findings were supported by

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<sup>17</sup> A copy of this recent decision is attached as Exhibit E.

substantial evidence. [ ] However, we begin with the presumption that the findings are supported by substantial evidence. It is the [Plaintiff's] burden to prove otherwise.”]

Furthermore, the court does not go back in time and look at the intent of the drafters and decision-makers of a General Plan to consider whether its land use decision should be upheld. Instead, it evaluates the proposed project in light of the General Plan's stated policies and goals. “[A] city's land use decisions must be consistent with the policies expressed in its general plan.” (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 378.)

After determining whether the proposed project is consistent or inconsistent with the General Plan, the local agency then prepares written findings. The court does not apply its own preferences as to whether the local agency should have granted a proposed project.

Once a general plan is in place, it is the province of elected city officials to examine the specifics of a proposed project to determine whether it would be “in harmony” with the policies stated in the plan. It is, emphatically, not the role of the courts to micromanage these development decisions. Our function is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies, whether the city officials made appropriate findings on this issue, and whether those findings are supported by substantial evidence.

(*Naraghi, supra*, at p. 10.)

Council member Rennie expressed concern that the court might order the Town Council to approve the proposed project “as is” and deprive the Council of any further control over it. The statute does not provide for that potential result unless the Town Council acts in “bad faith.” The code defines “bad faith” as meaning “an action that is frivolous or otherwise entirely without merit.” (Government Code section 65589.5, subdivision (l).)

As shown above, the denial of the permits here would most likely be upheld by the court and there is ample evidence in the record to support the findings supporting that decision.

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Thank you for considering our comments.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Leila H. Moncharsh', with a stylized flourish at the end.

Leila H. Moncharsh, J.D., M.U.P.  
Veneruso & Moncharsh

LHM:lm

cc: Ms. Dodson

# EXHIBIT A

California Civil Code § 51.3. [Effective Until 1/1/2017] Limitations on occupancy, residence, use based on age.

**CALIFORNIA CODES**

**CALIFORNIA CIVIL CODE**

**Division 1. PERSONS**

**Part 2. PERSONAL RIGHTS**

*Current through the 2016 Legislative Session*

**V 51.3. [Effective Until 1/1/2017] Limitations on occupancy, residence, use based on age**

- (a) The Legislature finds and declares that this section is essential to establish and preserve specially designed accessible housing for senior citizens. There are senior citizens who need special living environments and services, and find that there is an inadequate supply of this type of housing in the state.
- (b) For the purposes of this section, the following definitions apply:
  - (1) "Qualifying resident" or "senior citizen" means a person 62 years of age or older, or 55 years of age or older in a senior citizen housing development.
  - (2) "Qualified permanent resident" means a person who meets both of the following requirements:
    - (A) Was residing with the qualifying resident or senior citizen prior to the death, hospitalization, or other prolonged absence of, or the dissolution of marriage with, the qualifying resident or senior citizen.
    - (B) Was 45 years of age or older, or was a spouse, cohabitant, or person providing primary physical or economic support to the qualifying resident or senior citizen.
  - (3) "Qualified permanent resident" also means a disabled person or person with a disabling illness or injury who is a child or grandchild of the senior citizen or a qualified permanent resident as defined in paragraph (2) who needs to live with the senior citizen or qualified permanent resident because of the disabling condition, illness, or injury. For purposes of this section, "disabled" means a person who has a disability as defined in subdivision (b) of Section 54. A "disabling injury or illness" means an illness or injury which results in a condition meeting the definition of disability set forth in subdivision (b) of Section 54.
    - (A) For any person who is a qualified permanent resident under this paragraph whose disabling condition ends, the owner, board of directors, or other governing body may require the formerly disabled resident to cease residing in the development upon receipt of six months' written notice; provided, however, that the owner, board of directors, or other governing body may allow the person to remain a resident for up to one year after the disabling condition ends.

(B) The owner, board of directors, or other governing body of the senior citizen housing development may take action to prohibit or terminate occupancy by a person who is a qualified permanent resident under this paragraph if the owner, board of directors, or other governing body finds, based on credible and objective evidence, that the person is likely to pose a significant threat to the health or safety of others that cannot be ameliorated by means of a reasonable accommodation; provided, however, that the action to prohibit or terminate the occupancy may be taken only after doing both of the following:

- (i) Providing reasonable notice to and an opportunity to be heard for the disabled person whose occupancy is being challenged, and reasonable notice to the coresident parent or grandparent of that person.
- (ii) Giving due consideration to the relevant, credible, and objective information provided in the hearing. The evidence shall be taken and held in a confidential manner, pursuant to a closed session, by the owner, board of directors, or other governing body in order to preserve the privacy of the affected persons.

The affected persons shall be entitled to have present at the hearing an attorney or any other person authorized by them to speak on their behalf or to assist them in the matter.

- (4) "Senior citizen housing development" means a residential development developed, substantially rehabilitated, or substantially renovated for, senior citizens that has at least 35 dwelling units.

Any senior citizen housing development which is required to obtain a public report under Section 11010 of the Business and Professions Code and which submits its application for a public report after July 1, 2001, shall be required to have been issued a public report as a senior citizen housing development under Section 11010.05 of the Business and Professions Code. No housing development constructed prior to January 1, 1985, shall fail to qualify as a senior citizen housing development because it was not originally developed or put to use for occupancy by senior citizens.

- (5) "Dwelling unit" or "housing" means any residential accommodation other than a mobilehome.
- (6) "Cohabitant" refers to persons who live together as husband and wife, or persons who are domestic partners within the meaning of Section 297 of the Family Code.
- (7) "Permitted health care resident" means a person hired to provide live-in, long-term, or terminal health care to a qualifying resident, or a family member of the qualifying resident providing that care. For the purposes of this section, the care provided by a permitted health care resident must be substantial in nature and must provide either assistance with necessary daily activities or medical treatment, or both.

**A permitted health care resident shall be entitled to continue his or her occupancy, residency, or use of the dwelling unit as a permitted resident in the absence of the senior citizen from the dwelling unit only if both of the following are applicable:**

- (A) The senior citizen became absent from the dwelling due to hospitalization or other necessary medical treatment and expects to return to his or her residence within 90 days from the date the absence began.**
- (B) The absent senior citizen or an authorized person acting for the senior citizen submits a written request to the owner, board of directors, or governing board stating that the senior citizen desires that the permitted health care resident be allowed to remain in order to be present when the senior citizen returns to reside in the development.**

**Upon written request by the senior citizen or an authorized person acting for the senior citizen, the owner, board of directors, or governing board shall have the discretion to allow a permitted health care resident to remain for a time period longer than 90 days from the date that the senior citizen's absence began, if it appears that the senior citizen will return within a period of time not to exceed an additional 90 days.**

- (c) The covenants, conditions, and restrictions and other documents or written policy shall set forth the limitations on occupancy, residency, or use on the basis of age. Any such limitation shall not be more exclusive than to require that one person in residence in each dwelling unit may be required to be a senior citizen and that each other resident in the same dwelling unit may be required to be a qualified permanent resident, a permitted health care resident, or a person under 55 years of age whose occupancy is permitted under subdivision (h) of this section or under subdivision (b) of Section 51.4. That limitation may be less exclusive, but shall at least require that the persons commencing any occupancy of a dwelling unit include a senior citizen who intends to reside in the unit as his or her primary residence on a permanent basis. The application of the rules set forth in this subdivision regarding limitations on occupancy may result in less than all of the dwellings being actually occupied by a senior citizen.**
- (d) The covenants, conditions, and restrictions or other documents or written policy shall permit temporary residency, as a guest of a senior citizen or qualified permanent resident, by a person of less than 55 years of age for periods of time, not less than 60 days in any year, that are specified in the covenants, conditions, and restrictions or other documents or written policy.**
- (e) Upon the death or dissolution of marriage, or upon hospitalization, or other prolonged absence of the qualifying resident, any qualified permanent resident shall be entitled to continue his or her occupancy, residency, or use of the dwelling unit as a permitted resident. This subdivision shall not apply to a permitted health care resident.**
- (f) The condominium, stock cooperative, limited-equity housing cooperative, planned development, or multiple-family residential rental property shall have been developed for, and initially been put to use as, housing for senior citizens, or shall have been substantially rehabilitated or renovated for, and immediately afterward put to use as, housing for senior citizens, as provided in this section; provided, however, that no housing development**

constructed prior to January 1, 1985, shall fail to qualify as a senior citizen housing development because it was not originally developed for or originally put to use for occupancy by senior citizens.

- (g) The covenants, conditions, and restrictions or other documents or written policies applicable to any condominium, stock cooperative, limited-equity housing cooperative, planned development, or multiple-family residential property that contained age restrictions on January 1, 1984, shall be enforceable only to the extent permitted by this section, notwithstanding lower age restrictions contained in those documents or policies.
- (h) Any person who has the right to reside in, occupy, or use the housing or an unimproved lot subject to this section on January 1, 1985, shall not be deprived of the right to continue that residency, occupancy, or use as the result of the enactment of this section.
- (i) The covenants, conditions, and restrictions or other documents or written policy of the senior citizen housing development shall permit the occupancy of a dwelling unit by a permitted health care resident during any period that the person is actually providing live-in, long-term, or hospice health care to a qualifying resident for compensation. For purposes of this subdivision, the term "for compensation" shall include provisions of lodging and food in exchange for care.
- (j) Notwithstanding any other provision of this section, this section shall not apply to the County of Riverside.

**Cite as Ca. Civ. Code V 51.3**

**History.** Amended by Stats 2000 ch 1004 ( SB 2011), s 3, eff. 1/1/2001.

Previously Amended September 3, 1999 (Bill Number: SB 382) (Chapter 324).

**Note:** *This section is set out twice. See also Ca. Civ. Code 1 51.3, as amended by Stats 2016 ch 50 ( SB 1005), s 5, eff. 1/1/2017.*

**EXHIBIT B**

**California Government Code ↕ 65589.5. Housing development projects for very low, low or moderate-income households including emergency shelters.**

**CALIFORNIA CODES**

**CALIFORNIA GOVERNMENT CODE**

**Title 7. PLANNING AND LAND USE**

**Division 1. PLANNING AND ZONING**

**Chapter 3. LOCAL PLANNING**

**Article 10.6. Housing Elements**

*Current through the 2016 Legislative Session*

**h 65589.5. Housing development projects for very low, low or moderate-income households including emergency shelters**

- (a) The Legislature finds and declares all of the following:
- (1) The lack of housing, including emergency shelters, is a critical problem that threatens the economic, environmental, and social quality of life in California.
  - (2) California housing has become the most expensive in the nation. The excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing.
  - (3) Among the consequences of those actions are discrimination against low-income and minority households, lack of housing to support employment growth, imbalance in jobs and housing, reduced mobility, urban sprawl, excessive commuting, and air quality deterioration.
  - (4) Many local governments do not give adequate attention to the economic, environmental, and social costs of decisions that result in disapproval of housing projects, reduction in density of housing projects, and excessive standards for housing projects.
- (b) It is the policy of the state that a local government not reject or make infeasible housing developments, including emergency shelters, that contribute to meeting the need determined pursuant to this article without a thorough analysis of the economic, social, and environmental effects of the action and without complying with subdivision (d).
- (c) The Legislature also recognizes that premature and unnecessary development of agricultural lands for urban uses continues to have adverse effects on the availability of those lands for food and fiber production and on the economy of the state. Furthermore, it is the policy of the state that development should be guided away from prime agricultural lands; therefore, in

implementing this section, local jurisdictions should encourage, to the maximum extent practicable, in filling existing urban areas.

(d) A local agency shall not disapprove a housing development project, including farmworker housing as defined in subdivision (h) of Section 50199.7 of the Health and Safety Code, for very low, low-, or moderate-income households, or an emergency shelter, or condition approval in a manner that renders the project infeasible for development for the use of very low, low-, or moderate-income households, or an emergency shelter, including through the use of design review standards, unless it makes written findings, based upon substantial evidence in the record, as to one of the following:

(1) The jurisdiction has adopted a housing element pursuant to this article that has been revised in accordance with Section 65588, is in substantial compliance with this article, and the jurisdiction has met or exceeded its share of the regional housing need allocation pursuant to Section 65584 for the planning period for the income category proposed for the housing development project, provided that any disapproval or conditional approval shall not be based on any of the reasons prohibited by Section 65008. If the housing development project includes a mix of income categories, and the jurisdiction has not met or exceeded its share of the regional housing need for one or more of those categories, then this paragraph shall not be used to disapprove or conditionally approve the project. The share of the regional housing need met by the jurisdiction shall be calculated consistently with the forms and definitions that may be adopted by the Department of Housing and Community Development pursuant to Section 65400. In the case of an emergency shelter, the jurisdiction shall have met or exceeded the need for emergency shelter, as identified pursuant to paragraph (7) of subdivision (a) of Section 65583. Any disapproval or conditional approval pursuant to this paragraph shall be in accordance with applicable law, rule, or standards.

(2) The development project or emergency shelter as proposed would have a specific, adverse impact upon the public health or safety, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible. As used in this paragraph, a "specific, adverse impact" means 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.

(3) The denial of the project or imposition of conditions is required in order to comply with specific state or federal law, and there is no feasible method to comply without rendering the development unaffordable to low- and moderate-income households or rendering the development of the emergency shelter financially infeasible.

(4) The development project or emergency shelter is proposed on land zoned for agriculture or resource preservation that is surrounded on at least two sides by land being used for agricultural or resource preservation purposes, or which does not have adequate water or wastewater facilities to serve the project.

(5)

The development project or emergency shelter is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation as specified in any element of the general plan as it existed on the date the application was deemed complete, and the jurisdiction has adopted a revised housing element in accordance with Section 65588 that is in substantial compliance with this article.

- (A) This paragraph cannot be utilized to disapprove or conditionally approve a housing development project if the development project is proposed on a site that is identified as suitable or available for very low, low-, or moderate-income households in the jurisdiction's housing element, and consistent with the density specified in the housing element, even though it is inconsistent with both the jurisdiction's zoning ordinance and general plan land use designation.
- (B) If the local agency has failed to identify in the inventory of land in its housing element sites that can be developed for housing within the planning period and are sufficient to provide for the jurisdiction's share of the regional housing need for all income levels pursuant to Section 65584, then this paragraph shall not be utilized to disapprove or conditionally approve a housing development project proposed for a site designated in any element of the general plan for residential uses or designated in any element of the general plan for commercial uses if residential uses are permitted or conditionally permitted within commercial designations. In any action in court, the burden of proof shall be on the local agency to show that its housing element does identify adequate sites with appropriate zoning and development standards and with services and facilities to accommodate the local agency's share of the regional housing need for the very low and low-income categories.
- (C) If the local agency has failed to identify a zone or zones where emergency shelters are allowed as a permitted use without a conditional use or other discretionary permit, has failed to demonstrate that the identified zone or zones include sufficient capacity to accommodate the need for emergency shelter identified in paragraph (7) of subdivision (a) of Section 65583, or has failed to demonstrate that the identified zone or zones can accommodate at least one emergency shelter, as required by paragraph (4) of subdivision (a) of Section 65583, then this paragraph shall not be utilized to disapprove or conditionally approve an emergency shelter proposed for a site designated in any element of the general plan for industrial, commercial, or multifamily residential uses. In any action in court, the burden of proof shall be on the local agency to show that its housing element does satisfy the requirements of paragraph (4) of subdivision (a) of Section 65583.
- (e) Nothing in this section shall be construed to relieve the local agency from complying with the congestion management program required by Chapter 2.6 (commencing with Section 65088) of Division 1 of Title 7 or the California Coastal Act of 1976 (Division 20 (commencing with Section 30000) of the Public Resources Code). Neither shall anything in this section be construed to relieve the local agency from making one or more of the findings required pursuant to Section 21081 of the Public Resources Code or otherwise complying with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

- (f) (1) Nothing in this section shall be construed to prohibit a local agency from requiring the development project to comply with objective, quantifiable, written development standards, conditions, and policies appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need pursuant to Section 65584. However, the development standards, conditions, and policies shall be applied to facilitate and accommodate development at the density permitted on the site and proposed by the development.
- (2) Nothing in this section shall be construed to prohibit a local agency from requiring an emergency shelter project to comply with objective, quantifiable, written development standards, conditions, and policies that are consistent with paragraph (4) of subdivision (a) of Section 65583 and appropriate to, and consistent with, meeting the jurisdiction's need for emergency shelter, as identified pursuant to paragraph (7) of subdivision (a) of Section 65583. However, the development standards, conditions, and policies shall be applied by the local agency to facilitate and accommodate the development of the emergency shelter project.
- (3) This section does not prohibit a local agency from imposing fees and other exactions otherwise authorized by law that are essential to provide necessary public services and facilities to the development project or emergency shelter.
- (g) This section shall be applicable to charter cities because the Legislature finds that the lack of housing, including emergency shelter, is a critical statewide problem.
- (h) The following definitions apply for the purposes of this section:
- (1) "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.
- (2) "Housing development project" means a use consisting of any of the following:
- (A) Residential units only.
- (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.
- (C) Transitional housing or supportive housing.
- (3) "Housing for very low, low-, or moderate-income households" means that either (A) at least 20 percent of the total units shall be sold or rented to lower income households, as defined in Section 50079.5 of the Health and Safety Code, or (B) 100 percent of the units shall be sold or rented to persons and families of moderate income as defined in Section 50093 of the Health and Safety Code, or persons and families of middle income, as defined in Section 65008 of this code. Housing units targeted for lower income households shall be made available at a monthly housing cost that does not

exceed 30 percent of 60 percent of area median income with adjustments for household size made in accordance with the adjustment factors on which the lower income eligibility limits are based. Housing units targeted for persons and families of moderate income shall be made available at a monthly housing cost that does not exceed 30 percent of 100 percent of area median income with adjustments for household size made in accordance with the adjustment factors on which the moderate-income eligibility limits are based.

- (4) "Area median income" means area median income as periodically established by the Department of Housing and Community Development pursuant to Section 50093 of the Health and Safety Code. The developer shall provide sufficient legal commitments to ensure continued availability of units for very low or low-income households in accordance with the provisions of this subdivision for 30 years.
- (5) "Disapprove the development project" includes any instance in which a local agency does either of the following:
  - (A) Votes on a proposed housing development project application and the application is disapproved.
  - (B) Fails to comply with the time periods specified in subdivision (a) of Section 65950. An extension of time pursuant to Article 5 (commencing with Section 65950) shall be deemed to be an extension of time pursuant to this paragraph.
- (i) If any city, county, or city and county denies approval or imposes restrictions, including design changes, a reduction of allowable densities or the percentage of a lot that may be occupied by a building or structure under the applicable planning and zoning in force at the time the application is deemed complete pursuant to Section 65943, that have a substantial adverse effect on the viability or affordability of a housing development for very low, low-, or moderate-income households, and the denial of the development or the imposition of restrictions on the development is the subject of a court action which challenges the denial, then the burden of proof shall be on the local legislative body to show that its decision is consistent with the findings as described in subdivision (d) and that the findings are supported by substantial evidence in the record.
- (j) When a proposed housing development project complies with applicable, objective general plan and zoning standards and criteria, including design review standards, in effect at the time that the housing development project's application is determined to be complete, but the local agency proposes to disapprove the project or to approve it upon the condition that the project be developed at a lower density, the local agency shall base its decision regarding the proposed housing development project upon written findings supported by substantial evidence on the record that both of the following conditions exist:
  - (1) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means 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.

- (2) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.
- (k) The applicant or any person who would be eligible to apply for residency in the development or emergency shelter may bring an action to enforce this section. If, in any action brought to enforce the provisions of this section, a court finds that the local agency disapproved a project or conditioned its approval in a manner rendering it infeasible for the development of an emergency shelter, or housing for very low, low-, or moderate-income households, including farmworker housing, without making the findings required by this section or without making sufficient findings supported by substantial evidence, the court shall issue an order or judgment compelling compliance with this section within 60 days, including, but not limited to, an order that the local agency take action on the development project or emergency shelter. The court shall retain jurisdiction to ensure that its order or judgment is carried out and shall award reasonable attorney's fees and costs of suit to the plaintiff or petitioner who proposed the housing development or emergency shelter, except under extraordinary circumstances in which the court finds that awarding fees would not further the purposes of this section. If the court determines that its order or judgment has not been carried out within 60 days, the court may issue further orders as provided by law to ensure that the purposes and policies of this section are fulfilled, including, but not limited to, an order to vacate the decision of the local agency, in which case the application for the project, as constituted at the time the local agency took the initial action determined to be in violation of this section, along with any standard conditions determined by the court to be generally imposed by the local agency on similar projects, shall be deemed approved unless the applicant consents to a different decision or action by the local agency.
- (l) If the court finds that the local agency (1) acted in bad faith when it disapproved or conditionally approved the housing development or emergency shelter in violation of this section and (2) failed to carry out the court's order or judgment within 60 days as described in subdivision (k), the court, in addition to any other remedies provided by this section, may impose fines upon the local agency that the local agency shall be required to deposit into a housing trust fund. Fines shall not be paid from funds that are already dedicated for affordable housing, including, but not limited to, redevelopment or low- and moderate-income housing funds and federal HOME and CDBG funds. The local agency shall commit the money in the trust fund within five years for the sole purpose of financing newly constructed housing units affordable to extremely low, very low, or low-income households. For purposes of this section, "bad faith" shall mean an action that is frivolous or otherwise entirely without merit.
- (m) Any action brought to enforce the provisions of this section shall be brought pursuant to Section 1094.5 of the Code of Civil Procedure, and the local agency shall prepare and certify the record of proceedings in accordance with subdivision (c) of Section 1094.6 of the Code of Civil Procedure no later than 30 days after the petition is served, provided that the cost of preparation of the record shall be borne by the local agency. Upon entry of the trial court's order, a party shall, in order to obtain appellate review of the order, file a petition within 20 days after service upon it of a written notice of the entry of the order, or within such further time not exceeding an additional 20 days as the trial court may for good cause allow. If the local agency appeals the judgment of the trial court, the local agency shall post a bond, in an

amount to be determined by the court, to the benefit of the plaintiff if the plaintiff is the project applicant.

- (n) In any action, the record of the proceedings before the local agency shall be filed as expeditiously as possible and, notwithstanding Section 1094.6 of the Code of Civil Procedure or subdivision (m) of this section, all or part of the record may be prepared (1) by the petitioner with the petition or petitioner's points and authorities, (2) by the respondent with respondent's points and authorities, (3) after payment of costs by the petitioner, or (4) as otherwise directed by the court. If the expense of preparing the record has been borne by the petitioner and the petitioner is the prevailing party, the expense shall be taxable as costs.
- (o) This section shall be known, and may be cited, as the Housing Accountability Act.

Cite as Ca. Gov. Code § 65589.5

History. Amended by Stats 2015 ch 349 ( AB 1516), s 2, eff. 1/1/2016.

Amended by Stats 2010 ch 610 ( AB 2762), s 2, eff. 1/1/2011.

Amended by Stats 2007 ch 633 ( SB 2), s 4, eff. 1/1/2008.

Amended by Stats 2006 ch 888 ( AB 2511), s 5, eff. 1/1/2007.

Amended by Stats 2005 ch 601 ( SB 575), s 1, eff. 1/1/2006

Amended by Stats 2004 ch 724 ( AB 2348), s 4, eff. 1/1/2005

Amended by Stats 2003 ch 793 ( SB 619), s 3, eff. 1/1/2004.

Amended by Stats 2002 ch 147 ( SB 1721), s 1, eff. 1/1/2003.

Amended by Stats 2001 ch 237 ( AB 369), s 1, eff. 1/1/2002.

Previously Amended October 10, 1999 (Bill Number: SB 948) (Chapter 968).

# EXHIBIT C

239 Cal.App.4th 56, B250111, Carson Harbor Village, Ltd. v. City of Carson

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Case History

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190 Cal.Rptr.3d 511

**CARSON HARBOR VILLAGE, LTD., Plaintiff and Respondent,**

**v.**

**CITY OF CARSON, Defendant and Appellant.**

**B250111**

**California Court of Appeals, Second District, Eighth Division**

**July 31, 2015**

**[As Modification on August 21, 2015]**

APPEAL from a judgment of the Superior Court of Los Angeles County No. BS133538. James C. Chalfant, Judge.

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**OPINION**

**RUBIN, J.**

The City of Carson appeals from the judgment in this mandate action directing it to approve Carson Harbor Village, Ltd.'s application to convert its mobilehome park from a rental facility to a subdivision of resident-owned lots. We reverse because substantial evidence supports the City's findings that allowing the conversion would be inconsistent with the open space element of its general plan by placing at risk a state and federally regulated wetlands area within the confines of the mobilehome park.

## OVERVIEW

Cities must have general plans governing development, including the protection of open space, and must also deny proposed subdivisions that are inconsistent with their general plans. (Gov. Code, §§ 65300, 65302, 66474, subd. (b), 66498.6, 65567.)<sup>[1]</sup> The conversion of a mobilehome park from individual space rentals to lot ownership is a subdivision subject to the subdivision laws. (§§ 66424, 66427.4, 66427.5, 66428.1.) The statute governing that procedure is concerned with protecting low-income renters and a proposed conversion may be denied if the applicable local agency determines that the proposal is a sham designed to dodge local rent control ordinances. (§ 66427.5.) However, that statute limits the scope of the local agency's hearing to the issue of compliance with those statutory requirements. (§ 66427.5, subd. (e).)

Previous Courts of Appeal held that the scope of hearing provision barred local agencies from imposing additional conditions related to the bona fide conversion issue. In reliance on those decisions, we held in our earlier decision in this case that the scope of hearing provision also prevented local agencies from denying a proposed mobilehome park conversion if it was inconsistent with elements of a city's general plan. (*Carson Harbor Village, Ltd. v. City of Carson* (Mar. 30, 2010, B211777) [nonpub. opn.] (*Carson Harbor I*)). Our Supreme Court's later decision in *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783 [149 Cal.Rptr.3d 383, 288 P.3d 717] (*Pacific Palisades*) has led us to reconsider that part of our decision in *Carson Harbor I* and conclude that at least under the facts of this case, they now can.

## FACTS AND PROCEDURAL HISTORY

Carson Harbor Village, Ltd. (the park), is a mobilehome park in the City of Carson (City). It consists of 420 rental spaces on 70 acres of land, 17 acres of

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which are federally and state regulated wetlands and which is the only open space area within the City. In 2007 the City rejected the park's application to convert from rental spaces to a subdivision of individually owned lots. The primary reason for the denial was the City's finding that the proposed subdivision was a sham intended to skirt the City's rent control laws, based on the supposed inadequacy of tenant support surveys, as well as a lack of tenant support. The City also denied the application because the proposed subdivision was inconsistent with the affordable housing and open space elements of its general plan.<sup>[2]</sup>

A 2008 mandate action by the park led to a trial court judgment against the City. The trial court found that: (1) even though a 2005 tenant survey had been inadequate, a 2007 survey by the park had been properly conducted; (2) in any event, the application could not be rejected based on a lack of tenant support; and (3) the City could not deny the application for inconsistency with its general plan. The City appealed and we reversed in part and affirmed in part in *Carson Harbor I, supra*, B211777.

We held that the City could find the subdivision plan was a sham based on the lack of tenant support and remanded the matter back to the trial court with directions to order the City to reconsider the application in light of the 2007 survey, along with directions to receive additional information that would clarify or supplement the application and the evidence received before. (*Carson Harbor I, supra*, B211777.) We also held that the City could not reject the application based on its supposed inconsistency with elements of its general plan. (*Ibid.*)<sup>[2]</sup>

On remand, the City held new public hearings in 2011 and once more rejected the park's subdivision application. The City found that even though purchase incentives offered by the park had increased tenant support from 11 percent to 24 percent, that level of support was insufficient. The City also found that the proposed conversion was not bona fide because it was unlikely that many of the low income tenants living in the park would agree to buy their lots, the tenant survey improperly gauged support for the incentives, not the conversion, and the required tenant impact report did not include information requested about the wetlands and the displacement effect on current tenants. The City alternatively denied the application because it was inconsistent with its general plan's affordable housing and open space elements and posed a risk to the wetlands and its wildlife. (§ 66474, subs. (b) & (e).)

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The park brought another mandate action. The trial court issued an interim order that the City conduct a new hearing, and take expert evidence, concerning only the issue of whether the proposed conversion was bona fide. In 2012, the City held that hearing and once more rejected the park's subdivision application. The matter returned to the trial court, which found for the park on the bona fide conversion issue. The trial court also found that, in part based on our prior opinion, inconsistency with a local agency's general plan was not a proper ground to deny the application and that, in any event, there was no evidence the park's proposal was inconsistent with the City's general plan.

## STANDARD OF REVIEW

We review the City's decision to deny the park's subdivision application under the substantial evidence standard. (*218 Properties, LLC v. City of Carson* (2014) 226 Cal.App.4th 182, 189 [171 Cal.Rptr.3d 608] (*218 Properties*)). We do not review and are not bound by the trial court's factual findings or legal conclusions. (*Ibid.*) Instead, our scope of review is the same as the trial court's: we examine the entire record to determine whether the City's findings were supported by substantial evidence. (*Ibid.*) However, we begin with the presumption that the findings are supported by substantial evidence. It is the park's burden to prove otherwise. (*Carson Harbor Village, Ltd. v. City of Carson Mobilehome Park Rental Review Bd.* (1999) 70 Cal.App.4th 281, 287 [82 Cal.Rptr.2d 569].)

## DISCUSSION

### 1. The Laws Regarding General Plans and Subdivisions

All local governments must have a comprehensive and long-term general plan for the development of land within their boundaries. (§ 65300.) The general plan sits atop the hierarchy of land use regulations. (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773 [38 Cal.Rptr.2d 699, 889 P.2d 1019] (*DeVita*)). Acting much like a land-use constitution, it is the basic charter governing the direction of future land use within a locality. (*Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540, 542 [277 Cal.Rptr. 1, 802 P.2d 317].) The propriety of virtually any local

land use decision depends upon its consistency with the general plan. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570 [276 Cal.Rptr. 410, 801 P.2d 1161].)

The general plan must include seven elements – land use, circulation, conservation, housing, noise, safety, and open space – and must address each in whatever level of detail local conditions require. (*DeVita, supra*,

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9 Cal.4th at p. 773; §§ 65301, 65302.) Open-space land includes areas designated for the preservation of natural resources such as plant and animal life, including habitats for fish and wildlife species, along with streams and watershed lands. (§ 65560, subd. (b)(1).)

When enacting the open space elements law, the Legislature made several findings. (§ 65561.) The Legislature found that preserving open-space land was “necessary not only for the maintenance of the economy of the state, but also for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty, for recreation and for the use of natural resources.” (§ 65561, subd. (a).) The Legislature also found that increasing population “demands that cities, counties, and the state at the earliest possible date make definite plans for the preservation of valuable open-space land and take positive action to carry out such plans by the adoption and strict administration of laws....” (§ 65561, subd. (c).) Therefore the open space elements law was “necessary for the promotion of the general welfare and for the protection of the public interest in open-space land.” (§ 65561, subd. (e).)

The Legislature also declared its intent in adopting the open space element law: “(a) To assure that cities and counties recognize that open-space land is a limited and valuable resource which must be conserved wherever possible. [¶] (b) To assure that every city and county will prepare and carry out open-space plans which, along with state and regional open-space plans, will accomplish the objectives of a comprehensive open-space program.” (§ 65562.) Therefore, “[n]o building permit may be issued, no subdivision map approved, and no open-space zoning ordinance adopted, unless the proposed construction, subdivision or ordinance is consistent with the local open-space plan.” (§ 65567.)

The Subdivision Map Act (§§ 66410-66499.37 (the Map Act)) is the primary regulatory control over the subdivision of real property in California. (*Pacific Palisades, supra*, 55 Cal.4th at p. 798.) The Map Act is designed to promote orderly community developments and involves an application process that culminates in public hearings to determine whether a subdivision map will be approved. (55 Cal.4th at p. 799.) The Map Act lists a number of circumstances that require denial of a map, including inconsistency with an applicable general plan (§ 66474, subd. (b)), and the likelihood that the proposed subdivision will cause substantial environmental damage or substantially and avoidably injure fish or wildlife or their habitat. (§ 66474, subd. (e).) Mobilehome park conversions are subdivisions subject to the Map Act. (§§ 66424, 66427.4, 66427.5, 66428.1; *Pacific Palisades*, at p. 800.)

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## 2. Mobilehome Park Conversion Statutes

In 1984, the Legislature passed the Mobilehome Park Resident Ownership Program (Health & Saf. Code, § 50780, et seq., (MPROP)) because mobile-home parks—a significant source of

affordable housing—were threatened by cost increases, physical deterioration, and pressures to convert them to other uses. (*Pacific Palisades*, *supra*, 55 Cal.4th at pp. 803-804.) MPROP was designed to encourage and facilitate the conversion of mobilehome park ownership by residents, local public entities, or qualified nonprofit housing sponsors. To that end, MPROP provides for public financing assistance for mobilehome park conversions. (*Id.* at p. 804.)

In 1991, the Legislature enacted the provision in dispute here—section 66427.5. Although it has gone through a cycle of judicial interpretations and responsive legislative amendments, its essence remains the same. When a mobilehome park's owner seeks to convert from rental to resident ownership by way of the subdivision process, it must take certain steps in order to avoid the economic displacement of residents who choose not to buy. The owner must: (1) offer each existing tenant an option to either buy his current rental space or continue as a tenant; (2) file a report on the impact of the conversion on the tenants; (3) obtain a survey of tenant support for the proposed subdivision pursuant to an agreement with any resident homeowners' association; (4) submit the survey results to the agency that will act on the subdivision application; and (5) for low income nonpurchasing residents, apply a rent control formula for the ensuing four years. (§ 66427.5, subs. (a)-(e).)<sup>[4]</sup>

The process culminates in a hearing before the applicable local agency with authority to approve or disapprove the proposed subdivision. (§ 66427.5, subd. (e).) The troublesome issue here arises from the remainder of that subdivision, which states that “[t]he scope of the hearing shall be limited to the issue of compliance with this section.” (*Ibid.*) We next consider how that subdivision has been construed.

### 3. Legislative History of, and Appellate Decisions Construing, Section 66427.5

When section 66427.5 was enacted in 1991, it applied only to mobilehome subdivision conversions using public financing under MPROP. (Stats. 1991,

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ch. 475, § 2, p. 3324; *Colony Cove Properties, LLC v. City of Carson* (2010) 187 Cal.App.4th 1487, 1498-1499 [114 Cal.Rptr.3d 822] (*Colony Cove*.) The statute was amended in 1995 to remove the MPROP restriction and permit its application to all proposed mobilehome park conversions. (Stats. 1995, ch. 256, § 4, pp. 882, 883.) The 1995 amendment added provisions to avoid the economic displacement of tenants, including the requirements to: (1) offer residents a choice between buying or remaining as tenants; and, (2) file a report from the owner on the impact of the proposed conversion. (Stats. 1995, ch. 256, § 4, pp. 882, 883.) The 1995 amendment also added language to what was then subdivision (d) requiring a public hearing on the proposed subdivision that “shall be limited to the issue of compliance with this section.” (Stats. 1995, ch. 256, § 4, pp. 882, 883.) These amendments were silent on whether the conversion must be bona fide.

The court in *Donohue v. Santa Paula West Mobile Home Park* (1996) 47 Cal.App.4th 1168 [55 Cal.Rptr.2d 282] held that local rent control ordinances remained in effect after a subdivision was approved, but only until the first lot was sold. (*Id.* at p. 1175.) Worried that mobilehome park owners might take advantage of that holding and obtain relief from rent control once a single lot had been sold, the City of Palm Springs passed an ordinance requiring a showing that the proposed conversion was bona fide. This included a delay in lifting rent control until escrow closed on one-third of the lots. The court in *El Dorado Palm Springs, Ltd. v. City of Palm Springs* (2002) 96 Cal.App.4th 1153 [118 Cal.Rptr.2d 15] (*El Dorado*), held that the ordinance violated section 66427.5 because the 1995

amendments strictly limited local agencies from imposing conditions beyond those required by the statute. (*El Dorado*, at pp. 1165-1166.)

The Legislature amended section 66427.5 in response to *El Dorado* by moving the compliance hearing requirement to subdivision (e) and adding a new subdivision (d) that required the subdivider to obtain and provide a survey of the tenants in order to determine their support for the proposed conversion. (§ 66427.5, subd. (d), added by Stats. 2002, ch. 1143, § 1, pp. 7398, 7399; *Pacific Palisades*, *supra*, 55 Cal.4th at p. 809.) The Legislature also enacted, but did not include in the codified amendments, a statement that it intended to address *El Dorado* and ensure that mobilehome park conversions under section 66427.5 were bona fide. (Stats. 2002, ch. 1143, § 2, pp. 7399-7400.) However, the Legislature rejected a proposed amendment that would have given local agencies the authority to impose additional conditions they found “ ‘necessary to preserve affordability or to protect nonpurchasing residents from economic displacement.’ ” (Sen. Amend. to Assem. Bill No. 930 (2001-2002 Reg. Sess.) June 26, 2002, § 1, p. 3, italics omitted; *Pacific Palisades*, at p. 809.)

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In *Sequoia Park Associates v. County of Sonoma* (2009) 176 Cal.App.4th 1270 [98 Cal.Rptr.3d 669] (*Sequoia Park*), the court invalidated a county ordinance that set a sliding scale percentage of tenant support in order to determine whether a proposed conversion was bona fide. The court held that through section 66427.5 the Legislature had expressly and impliedly preempted any local regulation of mobilehome park conversions. (*Sequoia Park*, at pp. 1275, 1297-1300.) The court in *Colony Cove*, *supra*, 187 Cal.App.4th 1487 invalidated a similar ordinance enacted by the City of Carson, holding that the 1995 amendments to section 66427.5 prevented local agencies from adopting tougher measures regulating mobilehome park conversions. (*Colony Cove*, at p. 1506.) The court added that the Legislature’s rejection of a proposal to allow local agencies to add conditions showed that “it continues to oppose local deviation from or addition to the statutory criteria.” (*Ibid.*)

#### 4. The Pacific Palisades Decision

Two sets of statutes, not directly involved in the current appeal, were at issue in *Pacific Palisades*: the Coastal Act and the Mello Act. The California Coastal Act of 1976 (Pub. Resources Code, § 30000 et seq.; Coastal Act) empowers local agencies to regulate development within the state’s entire coastal zone. (Pub. Resources Code, § 30001.) The Mello Act (Gov. Code, §§ 65590, 65590.1) supplements the housing element provisions of the Government Code’s general plan scheme by establishing minimum requirements for affordable housing within the coastal zone. (§ 65590, subs. (b) & (k); *Pacific Palisades*, *supra*, 55 Cal.4th at p. 798.) The *Pacific Palisades* court considered whether a proposed mobilehome park subdivision in the coastal zone was subject to those provisions, or whether Government Code section 66427.5 occupied the field and barred their use by local agencies when considering a conversion application.

The park owner in *Pacific Palisades* brought a mandate action against the City of Los Angeles after the city refused to accept its subdivision application without also providing applications for a coastal development permit and for Mello Act approval. The trial court found for the owner, concluding that section 66427.5 set forth the exclusive requirements for subdivision approval, thus exempting the Coastal Act and the Mello Act from the subdivision application process. The Court of Appeal reversed, holding that the policy considerations behind the Coastal Act and Mello Act were more extensive than, and therefore took precedence over, those embodied in section 66427.5.

The Supreme Court affirmed, rejecting the park owner's contentions that, in line with *El Dorado*, *Sequoia Park*, and *Colony Cove*, Government Code section 66427.5 prevented local agencies from straying outside the requirements imposed by that section when passing on proposed mobilehome park

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conversions. Key to its analysis was the important policy considerations embodied in both the Coastal Act and the Mello Act. In enacting the Coastal Act, the Legislature found that the state's coastal zone was "a distinct and valuable natural resource of vital and enduring interest to all the people," that permanently protecting this resource was a "paramount concern" that was "necessary to protect the ecological balance of the coastal zone," and that making sure future developments complied with the act was "essential to the economic and social well-being of the people of this state...." (Pub. Resources Code, § 30001, subs. (a)-(d).) The Coastal Act relies heavily on local governments to achieve its purposes, and development permits issued under the Coastal Act are not just a matter of local law but also embody state policy. (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 794.) The Coastal Act is to be liberally construed. (Pub. Resources Code, § 30009.)

As for the Mello Act, the court looked to the housing element provisions of the general plan statutes, as to which the Legislature declared: "[t]he availability of housing is of vital statewide importance;" and "decent housing and a suitable living environment for every Californian... is a priority of the highest order." (§ 65580, subd. (a).) The Mello Act supplements these provisions in the coastal zone, the court held. (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 798.)

These "[s]ignificant state policies favor an interpretation of... section 66427.5" that does not strip away Coastal Act and Mello Act jurisdiction over land use within the coastal zone. (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 803.) The *Pacific Palisades* court rejected the park owner's reliance on MPROP as a superseding legislative policy that favored mobilehome park conversions by simplifying the approval process for those conversions. "[N]othing in... section 66427.5 suggests a belief by the Legislature that this policy is of more importance than and overrides the 'paramount' and 'vital' concerns of the Coastal Act and the Mello Act." (*Id.* at p. 805.)

This conclusion was supported by other factors: (1) section 66498.6, subdivision (b) of the Map Act states that nothing in that act affects a subdivider's or local agency's obligations to comply with applicable state and federal laws, regulations or policies; (2) the other interests at stake; and (3) the absence of language in section 66427.5 that expressly excepts mobile-home park conversions from those laws, regulations, or policies. (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 805.) These factors "strongly suggest [that section 66427.5], like the other provisions of the Subdivision Map Act, is intended to operate in conjunction with other state laws." (*Ibid.*)

The *Pacific Palisades* court also relied on rules of statutory construction requiring the courts to harmonize and reconcile inconsistencies between

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statutory provisions wherever possible and, absent an express declaration of legislative intent, to avoid implied repeals unless the conflicting provisions were fatally irreconcilable and inconsistent. (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 805.) Applying these rules, the Supreme Court held that section 66427.5 could be "construed to require a hearing devoted exclusively to the issue of economic displacement of tenants *in addition* to the procedures and hearings required by other state

laws.” (*Pacific Palisades*, *supra*, at p. 805, original italics.) “Such a construction is consistent with the general application of the Subdivision Map Act *and* the Coastal Act and the Mello Act to developments within the coastal zone, harmonizing the provisions of all three acts.” (*Ibid*, original italics.) It was also consistent with the Mello Act’s express mandate that it applied to mobilehome park conversions within the coastal zone. (*Id.* at pp. 805-806, citing § 65590, subds. (b) & (g)(1).) The contrary construction advanced by the park owner not only failed to harmonize the three acts; it would also lead to an implied partial repeal by overriding their provisions. (*Pacific Palisades*, at p. 806.)

Finally, the Supreme Court rejected the park owner’s reliance on *El Dorado*, *Sequoia Park*, and *Colony Cove*, including the Legislature’s decision to forego an amendment that would have given local agencies additional regulatory authority. At issue in those decisions was a local agency’s attempt to add further conditions to section 66427.5 in order to avoid economic displacement of the park’s tenants. None considered “the specific issues presented by this case: whether the section exempts conversions from other state laws, such as the Coastal Act and the Mello Act, or bars local agencies from exercising the authority delegated to them by the Coastal Act and the Mello Act to require compliance with those acts and to reject or deny applications that do not establish compliance.” (*Pacific Palisades*, *supra*, 55 Cal.4th at pp. 809-810.)

#### **5. The General Plan Open Space Element May Be Considered as Part of the Mobilehome Park Conversion Process**

The City contends that *Pacific Palisades*’ reasoning applies to its reliance on the open space element of its general plan as an alternative ground for denying the park’s conversion application. We agree.

The policy concerns that underlie the open space element are strikingly similar to those of the Coastal Act that the *Pacific Palisades* court found so persuasive. In the Coastal Act, the Legislature declared that the coastal zone was a “paramount concern” whose protection was “necessary” to protect a valuable resource that was “essential” to the economic and social well-being of Californians. (Pub. Resources Code, § 30001, subds. (b)-(d); see *Pacific Palisades*, *supra*, 55 Cal.4th at pp. 794, 804.) Likewise, the Legislature found

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that the open space elements law was “necessary” to maintain the economy and to assure the availability of land for agriculture, recreation, and scenic beauty. (§ 65561, subd. (a).) Our increasing population demanded that local agencies take positive action to protect open space, and that the open space laws were “necessary” to promote the general welfare and protect the public’s interest in maintaining this limited and valuable resource. (§ 65561, subds. (c) & (e); see § 65562, subd. (a).)

The existence of these policies brings into play the same interpretive rules promoting statutory harmonization and rejecting implied repeals that motivated the *Pacific Palisades* court. Under the Map Act, local agencies must reject a proposed subdivision if it is inconsistent with their general plan. (§ 66474, subd. (b).) And while a local agency may approve a vesting tentative subdivision map that departs from local ordinances, policies, and standards (§§ 66474.2, 66498.1, 66498.4) those departures are permitted only to the extent they are “authorized under applicable law.” (§ 66498.4.) Furthermore, nothing in these tentative vesting map provisions “removes, diminishes, or affects the obligation of any subdivider to comply with the conditions and requirements of any state or federal laws, regulations, or policies and does not grant local agencies the option to disregard any state or federal laws, regulations, or policies.” (§ 66498.6, subd. (b); see *Pacific Palisades*, *supra*, 55 Cal.4th

at p. 805.) Likewise, the general plan open space law states that no subdivision may be approved unless it is consistent with a local open space plan. (§ 65567.)

Although the park relies on the availability of MPROP public financing to show that its proposed subdivision will not displace tenants, that program requires compliance with local plans and zoning laws as a prerequisite to funding.<sup>[5]</sup> (Health & Saf. Code, § 50786, subd. (d)(3).) We do not see how the City could approve the subdivision based on the prospect of public financing for low incomes residents if the switch would be inconsistent with its general plan.

Section 66427.5 says nothing about excepting mobilehome park conversions from those requirements. (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 805.) Instead, section 66427.5 can be read to require a hearing on tenant economic displacement wholly apart from considerations of the open space element of the City's general plan. To hold otherwise would not just fail to harmonize these statutory provisions; it would also lead to their implied partial repeal. (55 Cal.4th at pp. 805-806.)<sup>[6]</sup>

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The park does not address these concerns. Instead, it contends we cannot follow *Pacific Palisades* for three reasons: (1) our holding in *Carson Harbor I* that general plan inconsistency was not an available ground for denying a proposed mobilehome park conversion is law of the case; (2) the *Pacific Palisades* holding is limited to the Coastal Act and the Mello Act; and (3) under section 66427.2, conversions to condominium ownership are exempt from the Map Act's requirements. We take each in turn.

First, the park relies on outdated authorities to support its law of the case contention. An intervening Supreme Court decision such as *Pacific Palisades* has for some time been considered an exception to the law of the case doctrine. (*Davies v. Krasna* (1975) 14 Cal.3d 502, 507, fn. 5 [121 Cal.Rptr. 705, 535 P.2d 1161]; *Ryan v. Mike-Ron Corp.* (1968) 259 Cal.App.2d 91, 96-97 [66 Cal.Rptr. 224].) The Court of Appeal decision in *Pacific Palisades* was filed in August 2010, and review was granted (*Pacific Palisades Bowl Mobile Estates v. City of Los Angeles*<sup>[7]</sup> (Cal.App.)), months after our decision in *Carson Harbor I*. The City's 2011 resolution denying the park's subdivision application expressly relied on general plan inconsistency as an alternative ground in the event the Supreme Court affirmed the Court of Appeal's *Pacific Palisades* decision. The Supreme Court did so, and as a result the law of the case exception applies here.

Second, we acknowledge that the *Pacific Palisades* court limited its holding to the applicability of the Coastal Act and the Mello Act to mobilehome park subdivisions. (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 803.) That was the issue presented to the court. The park contends that the court did more than that, reiterating the holdings of *El Dorado*, *Sequoia Park*, and *Colony Cove* that "section 66427.5 precludes local regulation of mobile-home park conversions to resident ownership . . ." (*Id.* at p. 810.) The park omits both the context and the court's qualifying language, which distinguished those decisions despite their seemingly broad statements precluding local regulation of mobilehome park conversions because none addressed "*the specific issues presented by this case: whether the section exempts conversions from other state laws, such as the Coastal Act and the Mello Act, or bars local agencies from exercising the authority delegated to them by [those acts] to require compliance with those acts. . .*" (*Ibid.*, italics added.)

In its introductory paragraph, the *Pacific Palisades* court framed its holding as a rejection of the notion that section 66427.5 exempts mobilehome park conversion "from the need to comply with

other state laws, ..." (*Pacific Palisades*, *supra*, 55 Cal.4th at p. 792.) Elsewhere, the court distinguished *El Dorado*, *Sequoia Park*, and *Colony Cove* and held that the factors underlying

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its analysis "strongly suggest that [§ 66427.5] like the other provisions of the Subdivision Map Act, is intended to operate in conjunction with other state laws." (*Id.* at p. 805, italics added.) Based on this, we do not read *Pacific Palisade* to preclude its application where other state laws are concerned. To the contrary, we see it as an invitation to consider that issue and apply *Pacific Palisade's* reasoning where appropriate.

Finally, the park contends that section 66474, part of the Map Act was not applicable under section 66427.2, which states: "Unless applicable general and specific plans contain definite objectives and policies, specifically directed to the conversion of existing buildings into condominium projects or stock cooperatives, ... [section 66474 and others not relevant here] shall not apply to condominium projects or stock cooperatives, which consist of the subdivision of airspace in an existing structure, unless new units are to be constructed or added."

This contention was raised without discussion or analysis of how it might apply here. For instance, the park simply assumes, without citation to authority, that section 66427.2 applies to mobilehome parks. We acknowledge that a mobilehome park might qualify under Civil Code section 4125, subdivision (b), which defines a condominium project as an undivided interest in the common area of real property, along with a separate interest in space called a unit, whose boundaries are included in a recorded final map. Even so, the park does not address why or whether the park's proposed subdivision "consist[s] of the subdivision of airspace in an existing structure, ..." (§ 66427.2.) Nor does it explain why or whether the City's open space element fails to include the requisite definite objectives and policies. (§ 66427.2.) We therefore deem the issue waived. (*Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708, 732 [136 Cal.Rptr.3d 197].)

We alternatively affirm on the merits of this issue. First, the City's open space element defines the wetlands as the *only* open space area that required preservation as a habitat for plant and animal life. In light of the City's findings concerning the environmental risks posed by the proposed conversion (see Discussion, pt. 6.1, *post*), the open space element's stated need to preserve the only available open space is a specific enough directive as it arises exclusively in the context of the mobilehome grounds. The park does not suggest, and we do not believe, that anything more need be said, at least on the facts of this case.

Second, applying section 66427.2 on these facts would conflict with several other provisions. These include: section 66474, subdivision (e), which requires the disapproval of a proposed subdivision that poses a sufficient risk

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to the environment or fish and wildlife; section 65567, part of the General Plan scheme, which prohibits subdivision approvals that conflict with a local open space plan; section 66498.6, subdivision (b), which prohibits disregard of state laws and policies when approving a vesting tentative map; and MPROP, which requires compliance with local plans in order to obtain the public-assistance financing that the park relies on to show that the proposed conversion will be affordable for its low-income tenants. (Health & Saf. Code, § 50786, subd. (d)(3).)

In short, whatever application section 66427.2 might have here is outweighed by the competing statutory and policy considerations requiring compliance with the City's open space element in order to preserve that valuable resource. For the reasons set forth above, we therefore hold that local agencies may deny a proposed mobilehome park subdivision that is inconsistent with the open space element of their general plans.<sup>[2]</sup> We next consider whether the evidence in this case supports the City's decision to do so.

## **6. Substantial Evidence Supports the City's Finding of Inconsistency With Its General Plan Open Space Element**

### **6.1 The City's Contentions**

The abridged version of the City's open space findings goes like this: the wetlands, which are the City's only open space, would be at risk from the proposed conversion to a common interest ownership because the residents would become unwilling and unsuitable stewards of that natural resource.

This conclusion was based on several factors. The open space element of the City's General Plan identifies the wetlands as the City's only open space area that required preservation as a habitat for plant and animal life. Abandoned oil wells were located near or within the wetlands. Contamination from dumping of oil by-products led to extensive litigation by the park against the well operators and others in

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the mid-1990s to recover its clean-up costs. The park settled that litigation and agreed to assume liability for future contamination. The wetlands serve as an outlet for several tributaries, which had been the cause of past contamination and concomitant litigation. Future contamination from illegal or accidental dumping of hazardous materials was still possible. Routine maintenance and general upkeep of items such as flood gates and drains were costly. The wetlands were subject to a complex scheme of state and federal regulations governing its maintenance. Residents were concerned about the time and costs involved in maintaining the wetlands, as well as future liability for contamination, and would be unable to meet their maintenance obligations or incur the costs required to do so if the mobilehome park conversion were approved.

On appeal, the City relies on *Dunex, Inc. v. City of Oceanside* (2013) 218 Cal.App.4th 1158 [160 Cal.Rptr.3d 670] (*Dunex*) to support these contentions. The *Dunex* court considered the appeal of a mobilehome park owner from Oceanside's denial of its application to convert to residential ownership. The mobilehome park was located within the coastal zone and therefore subject to the Coastal Act. The owner declined to provide an environmental report because the proposed subdivision would result in no physical changes to the property. The mobilehome park was located in a flood plain and one reason that Oceanside denied the application was its inconsistency with the city's local coastal plan.

Based on *Pacific Palisades, supra*, 55 Cal.4th 783, the *Dunex* court held that the application could be denied for inconsistency with Oceanside's local coastal plan. (*Dunex, supra*, 218 Cal.App.4th at pp. 1168-1169.) The court held that the city was warranted in finding that the proposed subdivision was inconsistent with its local coastal plan, which required minimization of risks to life and property in high flood areas. Even though the change in ownership would not add lots or create any physical changes to the property, "the city could reasonably conclude that individual ownership

would be an unacceptable increase in the risk to life and property *because it would move the flood risk to individuals far less able to either respond to or bear that risk than a single [mobilehome park] owner.*" (*Id.* at p. 1169, italics added, fn. omitted.)

The City contends that the *Dunex* rationale applies with equal force here because the evidence shows an unacceptable increase in the risk to the open space habitat if the individual residents became responsible for the wetlands, including its maintenance and any future contamination liability. The park does not discuss this issue and we therefore deem it waived. (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1247-1248 [166 Cal.Rptr.3d 676].)

We alternatively conclude on the merits that the *Dunex* rationale applies here. First, this notion finds support in MPROP, where the Legislature

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provided that ownership by public entities or nonprofits was appropriate for older mobilehome parks whose residents "may collectively lack the experience or other qualifications necessary to successfully own and operate their own parks" because they were more likely to be threatened by physical deterioration. (Health & Saf. Code, § 50780, subd. (a)(3).) Second, it is the logical extension of our holding that *Pacific Palisades* extends to mobilehome park subdivisions that violate the open space element of a local agency's general plan. Transferring open space to unwilling guardians who lack the resources to adequately protect it surely poses a meaningful risk to that land, especially in light of the legislative mandate to strictly administer the open space laws. (§65561, subd. (c).) We next consider whether substantial evidence supports such a finding.

## 6.2 The Evidence Supports a Finding of Open Space Risk

A November 2003 environmental assessment report prepared at the request of the park's lawyers identified three oil wells in and around the wetlands that were active until they were abandoned and plugged in accordance with state law in 2002. Lab tests showed that residual hydrocarbon contamination above regulated levels was still present at one of those wells.

The report said that oil drilling and related activities began in 1938, with photographs showing "several oil derricks, mud pits, stock tanks and production equipment in the central and northern portions of the site." That basic configuration continued into the 1980s, when the property was converted into a mobilehome park. Three or more oil wells and associated drilling and production equipment were on the site from 1938 through 2002, and it was possible that unreported "wildcat" wells could be on or near the site.<sup>[8]</sup> Oil and gas wells "are potential concerns when they seep oil or gas, and are not abandoned to current regulations, or have associated surface contamination. They may also be associated with methane hazards."

The park's environmental report determined that the site's oil production history was a recognized environmental concern under standard testing methods. That "means the presence or likely presence of hazardous substances or petroleum products on a property under conditions that indicate an existing release, a past release, or a material threat of a release of any

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hazardous substances or petroleum products...." Although the report concluded the risks were not significant, the park's status as a recognized environmental concern was "not intended to include *de*

*minimis* conditions that generally do not present a material risk of harm to public health or the environment and that generally would not be the subject of an enforcement action if brought to the attention of appropriate governmental agencies.” (Original italics.)

The City’s 2011 resolution denying the park’s application relied in part on *Carson Harbor Village, Ltd. v. Unocal Corp.* (9th Cir. 2001) 270 F.3d 863, to verify that the park had sued the well’s operators because of oil contamination in the wetlands. According to the Ninth Circuit, the park sued the former well operators in federal court to recover approximately \$285, 000 in costs incurred from cleaning up lead and petroleum that covered an area measuring 75 feet wide, 170 feet long, and 5 feet deep. (*Id.* at pp. 868-869.) Andrew Vasquez, the secretary of the tenants’ homeowners association, testified at a 2011 public hearing that the park settled that action and agreed to “accept responsibility for liability for contamination of the park.” That testimony was never rebutted.<sup>[9]</sup>

Documents prepared by the park show that the wetlands are regulated by both the state and federal governments and is home to protected wildlife. A Department of Fish and Game questionnaire filled out by the park in order to obtain permission to perform routine trash removal in the wetlands affirmed that the wetlands had been designated as “wild and scenic” under either state or federal law. An August 7, 2006, letter from the park’s lawyers to the City states that streambed maintenance was performed in late June or early July “to avoid disturbing the breeding season of protected wildlife.” The letter confirmed that the Department of Fish and Game “has primary oversight over the annual cleanup.”

The draft Covenants, Codes & Restrictions (CCRs) that the park prepared as part of the ongoing subdivision approval process states that the wetlands were federally protected and that the homeowners association to be formed upon subdivision “may be obligated, from time to time, to perform certain special maintenance of the Wetlands, which includes, but is not limited to, trash removal, repair of flood control gates, removal of damaged trees and replacement of French drains. The Association hereby affirms those obligations and intends that the City shall be a third party beneficiary of said obligations.”

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Photographs and written reports document the park’s annual clean-up efforts in 2006 and 2007. Approximately 250 trash bags were filled during the 2006 clean up. Photos from both years depict vast amounts of refuse strewn throughout the wetlands, some on the ground, some in the water impeding the flow through flood control gates. Annual maintenance costs were around \$50, 000.

During a 2007 hearing, city planning staff member Sheri Repp-Loadsman reported that the park owner had the marsh tested about 10 years earlier due to fears of possible contaminants entering from upstream.<sup>[10]</sup> Although the Regional Water Quality Control Board found no contamination, Repp-Loadsman believed that the possibility remained because the wetlands accepted flow from other sources.

Several park residents testified in 2011 about their reluctance to take on the responsibility of maintaining the wetlands. In addition to homeowners association secretary Vasquez’s testimony that the park settled its earlier oil contamination lawsuit by agreeing to accept responsibility for contamination, he also testified that “[n]o resident has the skill or specialized training to maintain a state-protected wetlands.” Vasquez wondered whether it was reasonable to “expect that mobile home park residents can manage a complex and enormous wetlands” without the financial resources that the

park had. Vasquez added that he could not afford the liability that might come from any future oil contamination.

Park resident Louis Cogut testified that buying into the subdivision came with responsibility for the common areas, including “the foul aroma from that marsh.” Park resident Martin Garcia testified that the residents could not afford to buy or borrow money to fund a lot purchase. Long-time park resident Ivan Gulligan testified that the park’s decaying infrastructure, including the marsh, made buying his lot undesirable. Park resident David White testified at a 2007 hearing that 65 percent of the park’s residents were low income, including seniors on fixed incomes with high medical bills. Of those residents voting on the proposed conversion, 65 percent also opposed it.

Instead of engaging in any meaningful discussion or analysis of the evidence on appeal, the park simply restates some of the trial court’s findings from the 2008 and 2013 mandate actions. As noted earlier, we do not review the trial court’s findings and our focus is instead on the evidence in the administrative record. We therefore hold that the park has waived the substantial evidence issue. (*In re C.R.* (2008) 168 Cal.App.4th 1387, 1393 [86 Cal.Rptr.3d 335].) We alternatively hold on the merits that the City’s open space risk findings are supported by substantial evidence.

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The evidence shows that the wetlands require extensive yearly maintenance, subject to regulatory oversight by the state Department of Fish and Wildlife, as well as federal regulations. It has a history of past oil contamination and, according to the park’s 2003 environmental report, contamination at one well remains above regulated levels. In addition, the report identifies the site’s past oil production activities as a recognized environmental concern, meaning it posed a material, not de minimis, risk of harm to the environment. There is a possibility that other wells remain on the site.

When the park settled its action with well operators, it agreed to accept responsibility for oil contamination. The CCRs for the proposed subdivision would place responsibility for the wetlands directly on the individual lot owners through their homeowners association. The residents, nearly two-thirds of whom are low income, are reluctant or unable to take on that administrative and financial liability. Combined with the facts that the wetlands are the only open space in the City and are home to federally protected wildlife, questions concerning the residents’ willingness and ability to tend to this important natural resource supports the City’s findings that the proposed mobilehome park conversion was inconsistent with the open space element of its general plan (§ 66474, subd. (b)), and would likely cause substantial environmental damage or substantially injure that habitat and the creatures living there. (*Id.* at subd. (e).) These findings are not necessarily offset by the prospect of the homeowners association hiring a professional management company to oversee the park’s day-to-day operations. Once the City determined that the conversion would be inconsistent with the open space element of the City’s general plan, the City was required to reject the park’s application. (§ 65567.)

#### DISPOSITION

The judgment is reversed and the trial court is directed to enter a new and different judgment in favor of the City of Carson. Appellant shall recover its appellate costs.

Flier, J., concurred.

BIGELOW, P. J., Concurring and Dissenting:

I concur in part and respectfully dissent in part.

I agree with the majority opinion's conclusion that the City of Carson (City) properly considered the issue of whether Carson Harbor Village, Ltd.'s (the park) proposed conversion was inconsistent with the City's general plan. As I indicated in *Carson Harbor Village, Ltd. v. City of Carson*

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(Mar. 30, 2010, B211777) [nonpub. opn.], I do not read the mobile home park conversion statute (see Gov. Code, § 66427.5)<sup>[1]</sup> to have established a stand alone process granting a park's residents a simple veto by vote over a proposed conversion. Section 66427.5 added a preliminary step in the subdivision process in the context of a mobile home park conversion to resident-owned spaces to address resident displacement concerns, leaving in place the broader structure of the Subdivision Map Act (§ 66410 et seq.). In *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783 [149 Cal.Rptr.3d 383, 288 P.3d 717], the Supreme Court clarified that section 66427.5 did not strip away California Coastal Act of 1976 (Pub. Resources Code, § 30000 et seq.; Coastal Act) and Mello Act jurisdiction over land use matters involving a proposed mobilehome park conversion. By parity of reasoning, I would find that section 66427.5 does not displace a subdivider's obligation to comply with the requirements of a city's general plan. (See § 65300 et seq.) As the majority notes, a city's general plan acts much like a land use constitution, governing future land use decisions within its jurisdiction. (*Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540, 542 [277 Cal.Rptr. 1, 802 P.2d 317].) I see no reason that a general plan ought to be afforded less importance than the Coastal or Mello Acts.

I depart with the majority opinion in its conclusion that substantial evidence supports the City's determination that the park's proposed conversion is inconsistent with the City's general plan. The "open space" element (see § 65560 et seq.) of the City's general plan is the only contested issue in the current case. As relevant to the current case, the City's "Open Space and Conservation Element" of its general plan reads as follows: "The Government Code requires that open space for the preservation of natural resources be incorporated into the General Plan. Such resources include areas required for the preservation of plant and animal life, areas of ecological and other scientific study value, rivers, streams, bays and estuaries, coastal beaches, and lake shores. The only such area identified within Carson is the lake within the Carson Village Mobilehome Park. This lake, covering approximately 17 acres, provides habitat for a variety of plants and small animals."

In my view, the issue is whether the park's proposed conversion will damage or endanger the lake, with its habitat for a variety of plants and small animals. I see no evidence in the record to support a conclusion that a change in the structure of the ownership of the park — from a landlord, single owner (a limited partnership) to a collective of individual owners with a managing homeowners' association — will harm the lake. A mobile home park with a lake was present before conversion and will still be present after conversion. The change in identity of the owner of the property, which is all that is truly at issue here, has not been shown to pose a danger to the lake.

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The majority opinion concludes that substantial evidence supports the City's finding that there would be a risk to the lake "because the residents would become unwilling and unsuitable stewards" of the lake. (Maj. opn., ante, at p. 72.) The ensuing discussion which follows, however, focuses on the environmental *conditions* of the lake, i.e., the physical problems and potential problems attendant with the lake. For example, the majority discusses trash, ongoing maintenance needs, and the future

potential need for remedial measures in the event of a contamination incident arising from capped oil wells in the area. However, the critical issue in this case is the *management* of the lake property. That is, whether there is evidence that the physical conditions of the lake are only capable of being properly managed with the existing single-owner structure in place, as opposed to a homeowners association after conversion. I do not see any such evidence. There is no evidence in the record to support a conclusion that the park's residents acting through a homeowners association would be less suitable stewards of the lake property than the current landlord, single owner of the property, or that the City would incur more difficulties in compelling needed environmental remedial measures against numerous individual owners acting through a homeowners association than it would against a landlord, single-owner of the property.

I acknowledge that *Dunex, Inc. v. City of Oceanside* (2013) 218 Cal.App.4th 1158 [160 Cal.Rptr.3d 670] (*Dunex*) supports the majority's opinion, but I am not convinced. *Dunex* offers no discussion of any evidence supporting its conclusion that a change from a landlord, single-owner structure to a homeowners association, multiple-owner structure poses a risk to open space. *Dunex* seems simply to accept that a city may find that individual owners of a mobilehome park will not be as good citizens as a prior landlord, single-owner had been. If *Dunex* is stating that the individual owners of a mobile home park will not have the financial resources to respond to problems as the prior landlord, single owner did, its conclusion is based on speculation as to the financial condition of the prior landlord owner. There is no *evidence* cited in *Dunex* actually showing the financial ability of *anyone* to address environmental problems. In the absence of evidence that a homeowners association would be less responsible, and or have less resources in matters of property management than a landlord, single owner of a property, I would affirm.

The only evidence in the record here concerning the *management* of the lake property is that the current owner undertook clean-up efforts in 2006 and 2007, and that annual maintenance costs are around \$50, 000. It is undisputed that there are 420 spaces in the park. Thus, the annual maintenance costs divided amongst residents would be approximately \$120, or about \$10 per month. I would not find the imposition of \$10 per month in maintenance costs to support a conclusion that the management of the park will be harmed in the future.

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I would affirm the trial court's judgment directing the City to approve the park's application to convert its mobile home park from a rental facility into a subdivision of resident-owned lots with a homeowners association.

Notes:

<sup>[1]</sup> All further undesignated section references are to the Government Code.

<sup>[2]</sup> Although the parties' primary focus has been on issues related to the extent of tenant support for the proposed conversion, our decision is based solely on the open space issue under the City's general plan. We therefore discuss the tenant support issues only briefly.

<sup>[3]</sup> As we set forth in part 5 of our Discussion, we were wrong. (See fn. 7, *post*.)

<sup>[4]</sup> The statute was amended in 2013 to provide that the local agency may deny a subdivision application if less than half the residents approve of the conversion. (§ 66427.5, subd. (d)(5).) Therefore, if the City were to consider the application in the first instance today, it could deny it based solely on the most recent tenant survey results. The City contends that we

can and should apply this new provision on appeal. However, we held in *218 Properties, supra*, 226 Cal.App.4th 182 that the City could not do so. (*Id.* at p. 194, fn. 7.) In any event, because we reverse on another ground we need not revisit that issue.

[5] The actual availability of those funds in light of the state's recent budget problems was in dispute.

[6] This conclusion carries extra weight in light of Health & Safety Code section 50786.

[7] Reporter's Note: Review granted on December 1, 2010, S187243. On November 29, 2012, the Court of Appeal opinion was affirmed. For Supreme Court opinion, see 55 Cal.4th 783.

[8] By doing so we acknowledge that we were wrong to hold otherwise in *Carson Harbor I, supra*, B211777. Presiding Justice Bigelow's dissent in that case pointed out that section 66427.5 was merely a "preliminary step in the subdivision process in the context of a mobilehome park conversion, adding a special hearing on the limited issue of resident displacement under the section as a whole, apart from the normally followed processes for approval of a tentative map [citation] and approval of a final map [citation]. I do not believe that section 66427.5, subdivision (e), was intended to eliminate the broader structure of the Subdivision Map Act vis-à-vis a tentative map and a final map, and the approval of the same.... As I read the statutes, once a subdivider and local agency have finished the required hearing to determine compliance with section 66427.5, the now-deemed compliant informational materials, are ready for the tentative map approval process." (*Carson Harbor I, supra*, B211777.) As we read *Pacific Palisades*, she was correct.

[9] The existence of other wells was confirmed in the City's 2012 environmental report, which said that there were 13 abandoned wells on the property dating back to the 1920s. Some of those were plugged with wood or stove pipe casings. That report was prepared for the court-ordered 2012 hearing on the bona fides of the park's conversion application and therefore was not a basis for the 2011 City finding that the proposed subdivision was inconsistent with its open space plan. Because we limit our analysis to the open space issue, which was decided by the City in only its 2011 resolution, the 2012 expert evidence plays no part in our analysis.

[10] It also appears that despite the park owner's financial resources and legal representation, the park owner was unable to recover his clean-up costs from the well operators under federal law because he failed to comply with its complex requirements. (*Carson Harbor Village v. County of Los Angeles* (9th Cir. 2006) 433 F.3d 1260, applying CERCLA, the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.S. § 9601 et seq.)

[11] The park contended in its federal court action for contamination from dumping oil by-products that certain government agencies were also liable for lead on the property that resulted from contaminated storm water runoff. (*Carson Harbor Vill. v. Unocal Corp., supra*, 270 F.3d at p. 869.)

[12] All further statutory codes are to the Government Code.

**EXHIBIT D**

California Government Code 65589. Construction of article.

**CALIFORNIA CODES**

**CALIFORNIA GOVERNMENT CODE**

**Title 7. PLANNING AND LAND USE**

**Division 1. PLANNING AND ZONING**

**Chapter 3. LOCAL PLANNING**

**Article 10.6. Housing Elements**

*Current through the 2016 Legislative Session*

**M65589. Construction of article**

- (a) Nothing in this article shall require a city, county, or city and county to do any of the following:
  - (1) Expend local revenues for the construction of housing, housing subsidies, or land acquisition.
  - (2) Disapprove any residential development which is consistent with the general plan.
- (b) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government to impose rent controls or restrictions on the sale of real property.
- (c) Nothing in this article shall be construed to be a grant of authority or a repeal of any authority which may exist of a local government with respect to measures that may be undertaken or required by a local government to be undertaken to implement the housing element of the local general plan.
- (d) The provisions of this article shall be construed consistent with, and in promotion of, the statewide goal of a sufficient supply of decent housing to meet the needs of all Californians.

**Cite as Ca. Gov. Code M65589**

**EXHIBIT E**

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT

NARAGHI LAKES NEIGHBORHOOD  
PRESERVATION ASSOCIATION,

Plaintiff and Appellant,

v.

CITY OF MODESTO,

Defendant and Respondent;

BERBERIAN HOLDINGS, L.P.,

Real Party in Interest and Respondent.

F071768

(Super. Ct. No. 2006259)

**OPINION**

APPEAL from a judgment of the Superior Court of Stanislaus County. Frank Dougherty, Judge. (Retired Judge of the Merced Super. Ct. assigned by the Chief Justice pursuant to article VI, § 6 of the Cal. Const.)

Law Office of Donald B. Mooney and Donald B. Mooney for Plaintiff and Appellant.

Meyers, Nave, Riback, Silver & Wilson and Edward Grutzmacher for Defendant and Respondent.

Downey Brand and Donald Sobelman for Real Party in Interest and Respondent.

Following the approval by the City of Modesto (the City) of a shopping center project (the project) that would be adjacent to an established residential neighborhood, Naraghi Lakes Neighborhood Preservation Association (appellant) filed a petition for writ of mandate challenging the approval of the project. Appellant claimed the City failed to follow the City of Modesto Urban Area General Plan (the General Plan), and did not adequately comply with certain requirements of the California Environmental Quality Act (CEQA).<sup>1</sup> The trial court denied the writ petition and entered judgment in favor of the City. Appellant appeals, contending the project was improperly approved and the petition should have been granted because, allegedly, (1) the project was inconsistent with the General Plan regarding the size of neighborhood shopping centers, (2) the City failed to make findings necessary under the General Plan's rezoning policy, (3) the City failed to comply with CEQA because the environmental impact report (EIR) improperly rejected feasible mitigation measures as to traffic impacts, and (4) no substantial evidence supported the City's CEQA findings regarding urban decay and the statement of overriding considerations. Having reviewed appellant's contentions in light of the entire record, we are unable to conclude that the City prejudicially abused its discretion on any of the grounds raised. Accordingly, the judgment of the trial court is affirmed.

### **FACTS AND PROCEDURAL HISTORY**

#### ***The Project Description***

The project proposed by real party in interest Berberian Holdings, L.P. (real party) is the construction of a new shopping center on approximately 18 acres of vacant land situated in northeast Modesto. The new shopping center, as proposed, will include

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<sup>1</sup> CEQA is found at Public Resources Code section 21000 et seq.

Unless otherwise indicated, all further statutory references are to the Public Resources Code.

CEQA's policies are implemented through regulations known as the CEQA Guidelines (Guidelines) found at California Code of Regulations, title 14, section 15000 et seq.

approximately 170,000 square feet of floor area, with a grocery store serving as the anchor tenant. The proposed site of the project is two contiguous parcels, one 12 acres in size and one six acres in size, bounded by Sylvan Avenue (north), undeveloped land and a storm water detention basin (south), Oakdale Road (east) and Hashem Drive (west). The completed project (i.e., the new shopping center) as proposed by real party will have two large buildings, one that is 78,290 square feet and another that is 66,230 square feet, each of which will be partitioned into spaces for various tenants. The smaller building is planned to include a 51,730 square foot area for the anchor grocery store tenant. Four freestanding pad buildings, ranging in size from 4,200 square feet to 7,670 square feet, are also part of the overall project. The project calls for 816 parking spaces.

An established residential neighborhood borders the project site on the west side along Hashem Drive. The project will provide an eight-foot tall masonry wall with a decorative cap along the west and south property lines. A 16-foot wide landscaped planter on the west side of the masonry wall will provide a further buffer between the development and the residences to the west. The project will be required to provide layered landscaping, shrubs and ornamental trees in the 16-foot wide planter area.

The project necessitates a General Plan Amendment to redesignate the project site from Mixed-use (MU) and Residential (R) zoning to Commercial (C), and to rezone the same property from Planned Development Zone P-D(211) to a new Planned Development Zone, to allow development of a shopping center.

***General Plan's Neighborhood Plan Prototype (NPP)***

There is no dispute that the project site is located within an area covered by the NPP policies of the General Plan. The General Plan, at chapter III, part C, paragraph 2, explains the purpose of the NPP policies as follows: "The [NPP] was developed in 1974 to provide a 'blueprint' for development of future residential neighborhoods. The [NPP] is designed to create residential areas served by neighborhood parks, elementary schools, a neighborhood shopping center, and a collector street pattern connecting these uses. The

[NPP] is a model for: subdivision designs, location of parks and other capital facilities, and zoning and pre-zoning studies. As of the baseline year of 1995, much of the Baseline Developed Area has been developed according to this Prototype. [¶] Within the Modesto community, 'Neighborhoods' are typically one mile by 3/4 mile (approximately 480 acres in size), and bordered by Arterial streets or Expressways."

The General Plan's NPP provisions then go on to describe the various *policies* that are applicable to the subject neighborhoods. After stating policies relating to housing types and the location of elementary schools and parks within each neighborhood, the NPP policies call for a neighborhood shopping center, described as follows: "A 7-9 acre neighborhood shopping center, containing 60,000 to 100,000 square feet of gross leasable space, should be located in each neighborhood. The shopping center should be located at the intersection of two Arterial streets, as shown in Figure III-2." (General Plan, ch. III, part C, § 2, ¶ d.)

### ***The Site's Entitlement History***

The same site has been approved for commercial development as a shopping center on two occasions prior to the instant project. Historically, the zoning for that location has been P-D(211), which allows condominium apartments and cluster houses. In 1981, the City approved a rezoning of the 12-acre parcel<sup>2</sup> to allow for the development of a shopping center at the corner of Sylvan Avenue and Oakdale Road. When that project did not get developed, the zoning was returned back to P-D(211). In 1987, the City again approved a request to rezone the 12-acre parcel for a shopping center development. When the planned shopping center did not proceed within the time limit for development, the City repealed the zoning changes and returned the zoning to P-D(211). The two shopping center entitlements previously approved (in 1981 and 1987)

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<sup>2</sup> Recall that the entire project site is 18 acres, consisting of two vacant parcels, one of 12 acres and one of six acres. The past entitlements involved the 12-acre parcel only.

for this site entailed proposed developments that were approximately 12 acres in size with approximately 80,000 square feet of leasable space.

***Real Party's Initial Application and City's Initial Environmental Study***

In November 2011, real party submitted an application to obtain necessary approvals for the proposed project. As noted above, the project set forth in real party's application consisted of a shopping center development on the 18-acre site at the corner of Sylvan Avenue and Oakdale Road, including approximately 170,000 square feet of leasable space with a grocery store as the anchor tenant. The completed shopping center would be called The Marketplace. It would also include an eight-foot tall wall and landscaping as a buffer on the western side of the shopping center along Hasham Drive. Additionally, an integral part of the project was a General Plan amendment to redesignate the project site from Mixed-use (MU) and Residential (R) to Commercial (C) and to rezone the same property from Planned Development Zone, P-D(211) to new Planned Development Zone (P-D) to allow development of a shopping center on the project site.

On May 11, 2012, the City released the results of an initial study, which reported that the Project was within the scope of the General Plan master EIR (MEIR) and that, pursuant to CEQA, no additional environmental review was required. The initial study concluded that the project would have no significant effects on the environment and was consistent with the General Plan and the MEIR. Regarding traffic impacts, the initial study included a traffic study prepared by the engineering firm of Kimley-Horn & Associates (the first traffic study).

The project was first brought before the City of Modesto Planning Commission (the Planning Commission) on August 6, 2012, and testimony was received. A second hearing before the Planning Commission took place on September 17, 2012. Appellant and individual residents of the neighborhood nearby the project site submitted letters stating their concerns or objections to the project due to apparent adverse impacts on the environment such as urban decay, traffic, noise, and General Plan inconsistency. The

Planning Commission recommended approval of the project by the city council, and a public hearing before the city council was set for October 23, 2012.

On October 23, 2012, appellant submitted a detailed comment letter to the city council, setting forth purported deficiencies in the City's and/or the planning staff's assessment of the project's impacts. Appellant asserted that the project created significant traffic, noise, urban decay, General Plan inconsistency and other environmental impacts. In addition, appellant submitted a peer-reviewed traffic memorandum, prepared by VRPA Technologies, which asserted that the first traffic study used incorrect methodologies to measure traffic impacts. VRPA's memorandum asserted that when the proper methodology was used, there were unmitigated traffic impacts of a significant nature at several intersections. The city council ultimately continued the public hearing to January 8, 2013.

On January 3, 2013, real party submitted a letter to the city council, acknowledging that the most efficient course of action would be to prepare a project EIR, since that process would allow the issues raised in appellant's letter to be analyzed and put to rest. The project application was taken off of the city council's meeting agenda and the EIR process formally began with the notice of preparation on February 4, 2013.

#### ***The EIR Process and Project Approval***

The draft EIR (DEIR) was completed on June 19, 2013, and a public comment period commenced on June 20, 2013, and continued through August 5, 2013. The DEIR included a new, much more extensive traffic analysis. Based on that analysis, the DEIR acknowledged the existence of significant traffic impacts that were allegedly unavoidable at several intersections and roadway segments near the proposed project. The City received only three comment letters on the DEIR, two from public agencies and one from appellant. Appellant's comment letter included a memorandum from its traffic consultant pointing out that the DEIR's analysis of traffic impacts had misapplied certain of the City's thresholds of significance. The City apparently agreed because it promptly revised

the traffic report and the relevant sections of the DEIR and issued a recirculated DEIR (RDEIR) for public comment from August 26 to October 10, 2013. The City received only three comment letters on the RDEIR, the same three as before. Appellant submitted a comment letter concerning the RDEIR, outlining alleged deficiencies in the RDEIR's analysis of impacts, alternatives and mitigation measures. The City responded to all comment letters received on both the DEIR and RDEIR in the final EIR (FEIR).<sup>3</sup>

On November 18, 2013, after nine months of work on the EIR, the project returned to the Planning Commission. Testimony was received at the hearing. Appellant's attorney spoke against the project, emphasizing the significant impacts on traffic that would not be adequately mitigated and General Plan inconsistency, among other things. The Planning Commission believed the concerns expressed by appellant were adequately addressed in the EIR. At the conclusion of the hearing, the Planning Commission adopted resolutions recommending that the city council certify the EIR and approve the project.

On December 10, 2013, the city council held its first public hearing on the EIR and the project. Appellant submitted written objections to the project, including challenges to the EIR's conclusions regarding infeasibility of certain mitigation measures as to traffic impacts. At the conclusion of the hearing, the city council closed the public hearing and continued consideration of the EIR and project to allow staff time to review appellant's recent submittal to ensure that the EIR had fully and adequately analyzed all environmental impacts.

We note that the EIR in this case followed a standard organizational approach that sought to address all of the necessary issues. Among other things, it described the

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<sup>3</sup> Unless otherwise indicated, the term EIR refers to the FEIR, which is understood to include and incorporate (1) the DEIR and the RDEIR, (2) all comments received, (3) the City's responses to comments or points raised in the review process, and (4) any other information added by the City. (Guidelines, § 15132.) We sometimes refer to the FEIR or DEIR separately, when it is helpful or convenient to do so.

project, summarized the potentially significant environmental impacts, discussed development alternatives to the project, and analyzed mitigation measures, including a delineation of which measures were feasible and which were infeasible. Further, the EIR in this case included a detailed description of the project's traffic impacts at several intersections and roadway segments that would be significant impacts but mitigation would allegedly be infeasible. The EIR also purported to explain why the project, despite its size, was in harmony with the policies of the General Plan.

On January 7, 2014, the city council adopted resolutions Nos. 2014-16 through 2014-18, certifying the EIR and making necessary project approvals. The city council also conducted the first reading of ordinance No. 3597-C.S., which was approved on the consent calendar at the January 14, 2014, city council meeting. The approvals included certification of the EIR and other CEQA findings, approval of the project application, and amendment to the General Plan and zoning. The City posted a notice of determination regarding the project on January 8, 2014.

### ***Petition for Writ of Mandate***

On February 6, 2014, appellant filed its verified petition for writ of mandate and complaint for declaratory relief (the petition) in the trial court. On March 5, 2015, after full briefing on the issues and a hearing, the trial court denied the relief sought in the petition. In its written order, the trial court reviewed the record and rejected each of appellant's claims. No abuse of discretion was found by the trial court. Judgment was entered in favor of the City and real party, and against appellant, on March 30, 2015. This appeal followed.

## **DISCUSSION**

### ***I. General Plan Consistency***

Appellant argues the project was in conflict with the General Plan in several key respects and that, consequently, the City abused its discretion in approving the project. Among the claims of General Plan inconsistency, appellant argues that the project did not

comply with the NPP policy regarding the size of the shopping center, and that certain mandatory findings necessary to rezoning of the site were not made. We begin by summarizing the applicable law and the standard of review relating to challenges based on alleged General Plan inconsistency.

**A. *Applicable Law and the Standard of Review***

A city must adopt a “comprehensive, long-term general plan” for its physical development. (Gov. Code, § 65300.) The general plan serves as a “‘charter for future development’” and contains the city’s fundamental policy decisions about such development. (*Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1194.) The policies in a general plan typically reflect a range of competing interests. (*Ibid.*; *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 142 (*Save our Peninsula*)). “General plans ordinarily do not state specific mandates or prohibitions. Rather, they state ‘policies,’ and set forth ‘goals.’” (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 378 (*Napa Citizens*)). Nevertheless, a city’s land use decisions must be consistent with the policies expressed in its general plan. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570; *Leshar Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 536; *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 815 (*Friends of Lagoon Valley*); Gov. Code, § 65860.) “[T]he propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements.” (*Citizens of Goleta Valley v. Board of Supervisors, supra*, at p. 570.)

The rule of general plan consistency is that the project must at least be *compatible with* the objectives and policies of the general plan. (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717–718 (*Sequoyah Hills*); *Friends of Lagoon Valley, supra*, 154 Cal.App.4th at p. 817.) “[S]tate law does not require precise conformity of a proposed project with the land use designation for a site, or an exact

match between the project and the applicable general plan. [Citations.] Instead, a finding of consistency requires only that the proposed project be ‘*compatible* with the objectives, policies, general land uses, and programs specified in’ the applicable plan. [Citation.] The courts have interpreted this provision as requiring that a project be “‘in agreement or harmony with’” the terms of the applicable plan, not in rigid conformity with every detail thereof.” (*San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 678 (*San Franciscans*)). To reiterate, the essential question is “whether the project is compatible with, and does not frustrate, the general plan’s goals and policies.” (*Napa Citizens, supra*, 91 Cal.App.4th at p. 378.)

As has been accurately observed by one court: “It is beyond cavil that no project could completely satisfy every policy stated in [a city’s general plan], and that state law does not impose such a requirement. [Citation.] A general plan must try to accommodate a wide range of competing interests ... and to present a clear and comprehensive set of principles to guide development decisions. Once a general plan is in place, it is the province of elected city officials to examine the specifics of a proposed project to determine whether it would be ‘in harmony’ with the policies stated in the plan. [Citation.] It is, emphatically, *not* the role of the courts to micromanage these development decisions. Our function is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies, whether the city officials made appropriate findings on this issue, and whether those findings are supported by substantial evidence. [Citations.]” (*Sequoyah Hills, supra*, 23 Cal.App.4th at pp. 719–720.)

Where, as here, a governing body has determined that a particular project is consistent with the relevant general plan, that conclusion carries a strong presumption of regularity that can be overcome only by a showing of abuse of discretion. (*Friends of Lagoon Valley, supra*, 154 Cal.App.4th at p. 816; *Napa Citizens, supra*, 91 Cal.App.4th at p. 357; *Sequoyah Hills, supra*, 23 Cal.4th at p. 717.) “We may neither substitute our

view for that of the city council, nor reweigh conflicting evidence presented to that body.” (*Sequoyah Hills, supra*, at p. 717.)

Moreover, judicial review of consistency findings is highly deferential to the local agency. (*Friends of Lagoon Valley, supra*, 154 Cal.App.4th at p. 816.) “[C]ourts accord great deference to a local governmental agency’s determination of consistency with its own general plan, recognizing that ‘the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. [Citations.] Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan’s policies when applying them, and it has broad discretion to construe its policies in light of the plan’s purposes. [Citations.] A reviewing court’s role ‘is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies.’ [Citation.]” (*San Franciscans, supra*, 102 Cal.App.4th at pp. 677–678, quoting from *Save Our Peninsula, supra*, 87 Cal.App.4th at p. 142.)

In our review of the City’s consistency findings in this case, our role is the same as that of the trial court; we independently review the City’s actions and are not bound by the trial court’s conclusions. (*Napa Citizens, supra*, 91 Cal.App.4th at p. 357.) In applying the substantial evidence standard, we resolve reasonable doubts in favor of the City’s finding and decision. (*Ibid.*) The essential inquiry is whether the City’s finding of consistency with the General Plan was “reasonable based on the evidence in the record.” (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 637.) “[A]s long as the City reasonably could have made a determination of consistency, the City’s decision must be upheld, regardless of whether *we* would have made that determination in the first instance.” (*Id.* at p. 638.) Generally speaking, the determination that a project is consistent with a city’s general plan will be reversed only if the evidence was such that no reasonable person could have reached the same

conclusion. (*San Franciscans, supra*, 102 Cal.App.4th at p. 677; accord, *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 26 (*San Diego Citizenry Group*).)

**B. NPP Policies**

Appellant first of all asserts that the project violates the NPP policies of the General Plan. The NPP policy provision at issue relates to the need for local shopping centers in the neighborhoods to which the NPP applies, and provides as follows: “A 7-9 acre neighborhood shopping center, containing 60,000 to 100,000 square feet of gross leasable space, should be located in each neighborhood.” The same policy provision states that the shopping center “should be located at the intersection of two Arterial streets, as shown in Figure III-2.”

We begin our consideration of this issue by noting how the City interpreted this General Plan policy in the proceedings below. The position taken by the City planning staff throughout the project review process, which was expressly adopted by the City in its findings approving the project, was that the project was consistent with the General Plan, including the NPP policies. The City concluded the project was consistent with the NPP policies because the project (1) provided for a neighborhood shopping center and (2) was properly located at an intersection of arterial streets. Further, while it was acknowledged that the project was larger than the neighborhood shopping center described in the NPP policies, the City understood that the depictions set forth therein were meant to provide guidance in the orderly development of neighborhoods, but were not mandatory limitations on the size of shopping centers. In support of this flexible interpretation, it was noted by staff in the proceedings before the Planning Commission and the city council that several other shopping centers had been approved by the City that exceeded the NPP policy’s acreage and square footage descriptions. As one staff report states: “It should be noted that since these policies were adopted, the City has approved eight neighborhood shopping centers that exceeded the size called for in this

policy, and in each case the City found the project consistent with the General Plan.” It was also noted by staff that for many years the market trend in grocery stores has been for higher square footage, which was represented by the developer to be more economically viable.

In the instant appeal, appellant disagrees with the City’s flexible interpretation and takes the position that all of the policies and descriptions set forth in the NPP should be treated as mandatory development standards. Appellant emphasizes that the project at hand is double the acreage amount and 70,000 square feet above the total leasable space contemplated in the NPP. Further, appellant points out that the City did not update the wording of the NPP in either 1995 or 2008, the two most recent occasions on which the City updated its General Plan and, therefore, any attempt to dismiss the NPP as being an outmoded relic in need of updating does not comport with the City’s conspicuous failure to revise it. Additionally, appellant argues the City’s position that shopping center developments larger than what is depicted in the NPP have routinely been approved by the City is flawed, because not all of the referenced shopping centers were in areas covered by the NPP policies. Finally, appellant argues that if the policies in the NPP were simply flexible goals to guide development, there would be no need for paragraph (f) of the NPP policies, which provides for minor adjustments to accommodate existing development in an area.

The City and real party (together respondents) have filed a joint respondents’ brief in the instant appeal. Respondents insist that the NPP policy’s enumerations of acreage and leasable square footage when describing a prototypical neighborhood shopping center were not meant as rigid development mandates, but rather were flexible descriptions to provide a basic model or pattern to guide the future development of the applicable neighborhoods.<sup>4</sup> Respondents argue that the project, although bigger than the

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<sup>4</sup> We note that the subject NPP policy, which states that a “7-9 acre neighborhood shopping center” containing “60,000 to 100,000 square feet of gross leasable space” should be

shopping center depicted in the NPP, was essentially compatible with its main goals of providing a needed neighborhood shopping center at the intersection of two arterial streets.

In support of their position, respondents rely on the plain language of the NPP policies as well as the City's history or past practice of flexibly interpreting the NPP policies. As to the NPP's wording, the terms "prototype" and "model" are used in the NPP to describe its overall purpose, which reasonably suggests that the policies stated therein were intended to provide a guiding pattern or a model for future development of applicable neighborhoods. Indeed, the NPP expressly states that it is "a model for: subdivision designs, location of parks and other capital facilities, and zoning and pre-zoning studies," and a "'blueprint' for development of future residential neighborhoods." Further, the NPP states that it was "designed to create residential areas served by neighborhood parks, elementary schools, a neighborhood shopping center, and a collector street pattern connecting these uses." As the City planning staff put it in the proceedings below, "the policies were developed with the intent to provide guidance on how to arrange or lay out land uses in a neighborhood." Additionally, the use of the word "should" in the vast majority of the NPP policies, including the policy at issue in this appeal, while the mandatory term "shall" was used in one instance not applicable to this case, provides a reasonable basis for the more flexible construction of the acreage and square footage provision, as urged by respondents.<sup>5</sup> Based on the foregoing observations, we conclude that the wording of the NPP is reasonably consistent with the interpretation given to it by the City. Of course, we are required to accord "great

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located in "each neighborhood" is not overtly phrased in terms of a mandatory cap or limitation. Thus, it may simply be a *descriptive estimate* of the usual or typical size of such a shopping center. Such a possibility fits the more flexible approach adopted by the City, with the City presumably having discretion to approve bigger or smaller centers when deemed advisable.

<sup>5</sup> Paragraph (g) of the NPP policies states a mandatory requirement: "If the expressway is a Class A expressway, there shall be no Collector streets intersecting with the expressway." Virtually all of the remaining policy statements use the word "should."

deference” to the City’s interpretation of its own General Plan. (*Save Our Peninsula, supra*, 87 Cal.App.4th at p. 142.)<sup>6</sup>

Appellant replies that the “[m]inor adjustments” clause in paragraph (f) of the NPP policies indicates strict compliance should be required as to all policy terms, including the size descriptions for neighborhood shopping centers. We think appellant reads too much into that provision, which states in full that “Minor adjustments to the [NPP] can be made to accommodate existing development in an area.” The provision is narrowly focused on what to do about *existing development* in an area. On that issue, it simply allows the City to work around existing uses or conditions on the ground; that is, it may make minor adjustments to accommodate for the same. Contrary to appellant’s suggestion, the provision does not address the broader concern of whether to make all other NPP policies mandatory and binding limitations.

In addition to the plain wording of the NPP policies, respondents assert that “[t]he City’s past practices also demonstrate the City’s consistent construction of the NPP Policies as providing guidance to inform development, not inflexible mandates ... [since] [t]here are multiple examples of the City’s approval of shopping center projects that exceed the prototype in either acreage, square footage, or both.” Respondents appear to be correct on this point. The two previous entitlements approved at the project site in 1981 and 1987 went substantially beyond the total acreage described in the prototype, each seeking to utilize 12 gross acres. The Lakes shopping center is located in an area covered by the NPP policies, and it exceeded the square footage parameters by 4,000 square feet. Other examples identified by respondents and mentioned in the record include the Standiford Square shopping center (at 10.22 acres and 112,579 sq. ft.), the

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<sup>6</sup> We are not suggesting that the framing of the NPP in terms of policies and goals (i.e., using the word “should”), rather than as rigid mandates, renders them merely advisory in nature. The test of compatibility still applies. (*Napa Citizens, supra*, 91 Cal.App.4th at p. 378.) Nevertheless, in deciding on the question of compatibility, we believe the nature and flexibility of the policy under consideration are important factors.

Dry Creek Meadows shopping center (at 11.25 acres and 112,146 sq. ft.), and Wood Colony Plaza (at 13.76 acres and 171,171 sq. ft.), the latter being larger than the project in total square footage.<sup>7</sup>

Appellant counters that at least two of the prior shopping center developments referenced by the City staff in the proceedings below (i.e., the Crossroads shopping center and Village Center) were not subject to the NPP policies. Respondents do not respond to appellant's objection as to Village Center, but argue that the NPP policies would have been applicable to the Crossroads shopping center because it was approved and constructed prior to the City's establishment of the Redevelopment Planning District in that location. We think that uncertainty remains regarding these two challenged examples. Nevertheless, this discrepancy noted by appellant only relates to a part of the overall record and is insufficient to undo the remainder of the evidence on this point. Even if the disputed examples are not counted, there is still sufficient substantial evidence in the record to confirm respondents' position that there has been a consistent practice to treat the acreage and square footage description in the NPP policy as a flexible guide to neighborhood development, rather than a strict limitation on the size of shopping centers.<sup>8</sup>

As we summarized above, general plan consistency may be found where a project is compatible with, and does not frustrate, the general plan's goals and policies. (*Napa Citizens, supra*, 91 Cal.App.4th at p. 378.) In deciding that question, we are required to accord great deference to an agency's determination that a project is consistent with its

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<sup>7</sup> In addition, respondents assert two further examples of approvals of shopping centers where the NPP policies were allegedly in effect, but the acreage and square footage numbers of the NPP were exceeded (i.e., Obrien's Marketplace and the Crossroads shopping center).

<sup>8</sup> We note that in the trial court, respondents distilled from the administrative record the "eight other shopping centers subject to NPP policies" that exceeded the acreage and square footage numbers stated in the NPP policy at issue. The eight were then summarized in a diagram that was attached to the trial court's ruling on petition for writ of mandate.

own general plan. (*Save Our Peninsula, supra*, 87 Cal.App.4th at p. 142.) That is because “the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity.” (*Ibid.*) Furthermore, “[b]ecause policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan’s policies when applying them, and it has broad discretion to construe its policies in light of the plan’s purposes.” (*Ibid.*)

In applying our deferential review, we decide whether the City’s finding of consistency with the General Plan was “reasonable based on the evidence in the record.” (*California Native Plant Society v. City of Rancho Cordova, supra*, 172 Cal.App.4th at p. 637.) “[A]s long as the City reasonably could have made a determination of consistency, the City’s decision must be upheld, regardless of whether *we* would have made that determination in the first instance.” (*Id.* at p. 638.) “An agency’s finding that a project is consistent with its general plan can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion.” (*San Diego Citizenry Group, supra*, 219 Cal.App.4th at p. 26.)

We find no abuse of discretion in the City’s determination that the project was consistent with its General Plan, including the NPP policies. First, aside from the increased size of the shopping center over the prototypical size, the project fits and is compatible with NPP policies by placing a neighborhood-serving shopping center at the corner of an intersection served by two arterial streets, exactly as depicted on the NPP map, and complying with all other relevant policies. Second, the City’s approval of a larger shopping center does not violate the General Plan because the NPP acreage and square footage descriptions were reasonably construed by the City as flexible guides to development, not rigid development limitations. That construction was reasonable based on the language of the NPP policies as well as the City’s own past practices in applying

the NPP provisions. For all of these reasons, we uphold the City's determination that the project was consistent with the NPP policies of the General Plan.

**C. Rezoning Policies**

Appellant contends the City failed to proceed in a manner required by law because, allegedly, it failed to make mandatory findings required by the General Plan's rezoning policy. (See *Woodland Hills Residents Assn., Inc. v. City Council* (1975) 44 Cal.App.3d 825, 837–838 [reversal of approval of subdivision map required where governing body failed to make legally mandated finding of consistency with general plan].) Respondents argue that all of the necessary findings were adequately made in connection with the several concurrent approvals on the project. On balance, we agree with respondents.

The General Plan's "Community Development Policies" contain a policy governing zoning changes (the rezoning policy), which requires the City to make certain findings when it approves a zoning change. The rezoning policy of the General Plan states, in relevant part, as follows:

"Zone changes may be approved anywhere in the General Plan Area, if the following findings are made:

"(1) The requested zone change is required by public convenience or necessity.

"(2) The requested change will result in an orderly planning use of land resources.

"(3) The requested zone change is in accordance with the community's objectives set forth in: '[NPP]' policies presented in Section C-2, below (for property within the Baseline Developed Area); or a Specific Plan prepared in accordance with this chapter (for property within the Planned Urbanizing Area); or the Redevelopment Plan (for property within the Redevelopment Area).

"(4) Adequate environmental mitigation has been provided through the implementation of appropriate mitigation measures established

by the [MEIR] and any supplements to the MEIR. Traffic and public facility issues are particularly relevant in this analysis.”

The City made several approvals relevant to the project, each with an array of detailed findings, including (1) resolution No. 2014-16 (approval of FEIR and mitigation measures and adoption of a mitigation monitoring and reporting program or MMRP, etc.), (2) approval of ordinance No. 3597-C.S. (zoning changes enacted), and (3) resolution No. 2014-17 (approval of amendment to General Plan and adoption of findings of General Plan consistency). As pointed out by respondents, the City’s findings specified in connection with its approval of ordinance No. 3597-C.S. clearly satisfied the first three of the four findings required by the rezoning policy. The same three concerns are covered to a further extent in the City’s findings made concerning its approval of resolution No. 2014-17. This leaves only the fourth of the necessary findings under the rezoning policy, which requires a finding of “[a]dequate environmental mitigation ... through the implementation of appropriate mitigation measures ....”

We agree with respondents that the fourth and final finding under the rezoning policy of “[a]dequate environmental mitigation” was satisfied by the City’s particular findings made in connection with approval of resolution No. 2014-16. In a series of recitals, resolution No. 2014-16 first summarized the history of environmental review of the project, including the City’s initial study that analyzed the project in relation to the MEIR, the City’s decision to prepare a project-level EIR after certain concerns relating to traffic and urban decay (among others) were raised, the preparation of the DEIR, RDEIR, and FEIR regarding the project, and the fact that environmental impacts, mitigation measures and alternatives were analyzed therein. Resolution No. 2014-16 then adopted the FEIR’s findings, analysis and conclusions as the City’s own, made certain CEQA findings including necessary findings relating to mitigation measures, adopted a mitigation monitoring and reporting program (MMRP), and made further, more detailed findings in an attachment that included a statement of overriding consideration. The

MMRP contained mitigation measures derived from both the MEIR and from the project-level FEIR and, therefore, it appears to have included appropriate mitigation measures established by the MEIR and by “any supplements to the MEIR.” In addition, it is clear from the administrative record that the City staff and the Planning Commission, in recommending approval of the project, indicated that the adoption of feasible mitigation measures under the project EIR (including the MMRP) provided the requisite “[a]dequate environmental mitigation” for purposes of the rezoning policy. Therefore, it appears that the findings in resolution No. 2014-16 were intended to satisfy the environmental adequacy finding under the rezoning policy. On balance, we conclude that the necessary findings under the rezoning policy were made by the City.<sup>9</sup>

In the second prong of its claim that the City failed to make findings sufficient to comply with the rezoning policy of the General Plan, appellant argues that even if findings were made, they were noncompliant on their face because the findings required by the rezoning policy as to environmental mitigation included a substantive component that “[a]dequate environmental mitigation” has been provided “through ... appropriate mitigation measures.” (Italics added.) Appellant argues that the word “adequate” should be construed to mean that all significant environmental impacts—such as traffic impacts—be mitigated to less than significant levels. Since the project entails certain traffic impacts that were found to be significant but mitigation was deemed to be

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<sup>9</sup> The City could have been clearer by more closely tracking its findings with the precise terms of the rezoning policy, and by including all four of the necessary findings together within the City’s rezoning approval. It should not have been necessary to locate any of the required findings among the other, concurrently adopted findings of the City. Nevertheless, since adequate findings were *in fact* made, we will affirm rather than elevate form over substance. To the extent that appellant is complaining that a fuller or more conspicuous elaboration of the MEIR’s mitigation measures might have been made in the project EIR (or in the MMRP), appellant has failed to demonstrate error by showing that a material omission of any applicable mitigation measure occurred and, in any event, failed to raise that particular point below.

infeasible, appellants argue the rezoning policy's mandatory findings requirement (of adequate environmental mitigation) was violated in this substantive sense.

We reject this line of argument because, among other things,<sup>10</sup> appellant's proffered interpretation of adequate mitigation is not reasonable in light of other policies in the General Plan. Goal No. 6.f. of the General Plan provides that the "highest possible levels of service for all transportation modes" be maintained on the City roadways, but only as "consistent with the financial resources reasonably available to the City and without unreasonably burdening property owners or developers with excessive roadway improvement costs." Similarly, goal No. 7.b. of the General Plan provides: "The City may allow individual locations to fall below the City's LOS [level of service] standards in instances where the construction of physical improvements would be infeasible, be prohibitively expensive, significantly impact adjacent properties or the environment, significantly impact non-motorized transportation systems, or have a significant adverse effect on the character of the community." When the rezoning policy is construed in light of these other provisions of the General Plan, the meaning of what is adequate mitigation under the circumstances must make allowances for the fact that mitigation is not required where it is infeasible. Therefore, appellant has failed to demonstrate that the City erred by simply adopting findings that did not require infeasible mitigation.<sup>11</sup>

***D. Other General Plan Policies***

Additionally, appellant contends the approval of the project was inconsistent with, or failed to adequately comply with, two more General Plan provisions or policies—namely, goals Nos. 6.f. and 7.e. Respondents object that since these specific contentions

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<sup>10</sup> For the reasons stated in the discussion above, we believe the findings adequately met the substance of the rezoning policy's finding requirements.

<sup>11</sup> Whether the findings of infeasibility were supported by substantial evidence is considered in our discussion regarding CEQA compliance. Here, we address only whether the City complied with the rezoning policy's finding requirements.

were not raised in the administrative proceedings below, they may not be raised in the present appeal. In light of the necessity of exhaustion of remedies, respondents are correct.

Under the exhaustion doctrine, regardless of whether the legal issues stem from CEQA or a failure to comply with a general plan, a party may not litigate issues in court that were not fully and fairly presented to the agency before it rendered the challenged decision. (Pub. Resources Code, § 21177, subd. (a); Gov. Code, § 65009, subd. (b)(1); *California Native Plant Society v. City of Rancho Cordova*, *supra*, 172 Cal.App.4th at pp. 615–616.) The rationale for the exhaustion doctrine is that the agency is entitled to learn the contentions of interested parties before litigation is instituted. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535.) “The essence of the exhaustion doctrine is the public agency’s opportunity to receive and respond to articulated factual issues and legal theories *before* its actions are subjected to judicial review.” (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1198.) To advance the exhaustion doctrine’s purpose, the exact issue must have been presented to the administrative agency. (*Sierra Club v. City of Orange*, *supra*, at p. 535.) General environmental comments, generalized references, or isolated or unelaborated comments will not suffice. (*Id.* at p. 536.) The objections must be “sufficiently specific so that the agency has the opportunity to evaluate and respond to them.” (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 909.) The petitioner bears the burden of demonstrating that the issues raised in the judicial proceeding were first raised at the administrative level. (*Ibid.*) The exhaustion of remedies requirement is jurisdictional. (*Sierra Club v. City of Orange*, *supra*, at p. 535.)

There is no indication in the record that appellant, or any other person, presented the specific contention in the administrative proceedings below that the project’s

approval was incompatible with goals Nos. 6.f. and 7.e. of the General Plan.<sup>12</sup> Therefore, under the exhaustion doctrine, these issues were not preserved for purposes of the instant judicial challenge and will not be considered.

## ***II. Compliance with CEQA***

Appellant contends the City failed to comply with CEQA in several respects, including that (1) the findings of infeasibility as to certain mitigation measures were not supported by substantial evidence, (2) the urban decay findings were not supported by substantial evidence, and (3) the findings made in connection with the statement of overriding considerations were not supported by substantial evidence. We now consider such claims, beginning our discussion with a summary of the standard of review for CEQA issues.

### ***A. CEQA Standard of Review***

Our review under CEQA is *de novo* in the sense that we review the agency's actions as opposed to the trial court's decision. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427 (*Vineyard*).

However, our inquiry extends only to whether there was a prejudicial abuse of discretion.

(§ 21168.5.) "Such an abuse is established [(1)] 'if the agency has not proceeded in a

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<sup>12</sup> Goal No. 6.f. states: "The highest possible levels of service for all transportation modes (vehicle, transit, pedestrian, and bicycle) shall be maintained on City roadways, consistent with the financial resources reasonably available to the City and without unreasonably burdening property owners or developers with excessive roadway improvement costs. On roadways where the LOS is expected to exceed LOS F, the City should consider mitigation measures other than road widening, such as the addition of bicycle lanes, improved pedestrian access, improved transit service, and the establishment of walkable development patterns. Data from the General Plan Traffic Analysis, described in the Traffic Appendix of the [MEIR], as updated from time-to-time, shall be used to evaluate the effectiveness of traffic mitigation measures adopted by the City Council."

Goal No. 7.e. states, in relevant part, that where an EIR is prepared for projects that could cause further traffic degradation below certain levels, the preparation of a comprehensive traffic study "shall include appropriate measures to update the General Plan Traffic Analysis for all subsequent Specific Plans, and for development within the affected Baseline Developed Area and Redevelopment Area, and shall conform to the Traffic Study Guidelines."

manner required by law or [(2)] if the determination or decision is not supported by substantial evidence.” (*Vineyard, supra*, at p. 426; see § 21168.5.) The nature of our judicial review of these two types of error “differs significantly.” (*Vineyard, supra*, at p. 435.) We determine de novo whether the agency has employed the correct procedures, “scrupulously enforce[ing] all legislatively mandated CEQA requirements,” but we apply the more deferential substantial evidence test to the agency’s substantive factual conclusions. (*Ibid.*)

As here, legal challenges under CEQA often relate to the adequacy of the information or analysis in the EIR. The EIR is “the heart of CEQA” and the primary mechanism to alert local agencies and the public to environmental impacts of proposed projects. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d. 376, 392 (*Laurel Heights*)). A public agency must prepare an EIR for any project that may have a significant impact on the environment. (§ 21100, subd. (a)). Among other things, the EIR must describe the proposed project and its environmental setting, identify and analyze the significant effects on the environment, state how those environmental impacts can be mitigated or avoided, and identify and discuss alternatives to the project. (Pub. Resources Code, §§ 21100, subd. (b), 21002.1, subd. (a); Guidelines, § 15126; *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 979 (*California Native Plant Society*)).

CEQA “requires an EIR to reflect a good faith effort at full disclosure”; however, “it does not mandate perfection, nor does it require an analysis to be exhaustive.” (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26 (*Dry Creek*)). The courts have looked “not for perfection but for adequacy, completeness, and a good faith effort at full disclosure.” (Guidelines, § 15151.) In reviewing an agency’s determination to approve an EIR, “The court does not pass on the correctness of an EIR’s environmental conclusions, but determines whether the EIR is sufficient as an informational document.” (*Dry Creek, supra*, at p. 26; see § 21168.5; *Laurel Heights*,

*supra*, 47 Cal.3d at pp. 392, 407.) “An adequate EIR must be ‘prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences. (Guidelines, § 15151.) It ‘must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.’ [Citation.]” (*Dry Creek, supra*, at p. 26.)

In challenges that are predominantly a dispute over the factual findings and conclusions reached in an EIR, “[t]he court must uphold an EIR if there is any substantial evidence in the record to support the agency’s decision that the EIR is adequate and complies with CEQA.” (*Dry Creek, supra*, 70 Cal.App.4th at p. 26; see *Laurel Heights, supra*, 47 Cal.3d at p. 392.) For example, CEQA challenges concerning the amount or type of information contained in the EIR, the scope of the analysis, the choice of methodology or the reliability of data are all factual determinations reviewed for substantial evidence. (*Madera Oversight Coalition, Inc. v. City of Madera* (2011) 199 Cal.App.4th 48, 101 (*Madera Oversight Coalition*); *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546; *California Native Plant Society, supra*, 177 Cal.App.4th at p. 986.) Likewise, in a factual dispute over “‘whether adverse effects have been mitigated or could be better mitigated’ [citation], the agency’s conclusion would be reviewed only for substantial evidence.” (*Vineyard, supra*, 40 Cal.4th at p. 435.)

Frequently, disputes center on the question of whether relevant information was omitted from an EIR. (*Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1391 (*Association of Irrigated Residents*)). Because a fundamental purpose of an EIR is to provide public agencies and the public with detailed information about the effect that a project is likely to have on the environment, the absence of information in an EIR may potentially constitute a failure to proceed in a manner required by law. (*Citizens for a Sustainable Treasure Island v. City and County of San Francisco*

(2014) 227 Cal.App.4th 1036, 1046 (*Citizens for a Sustainable Treasure Island*.)

However, “The absence of information in an EIR does not per se constitute a prejudicial abuse of discretion. (§ 21005.) A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process.” (*Dry Creek, supra*, 70 Cal.App.4th at p. 26; accord, *Citizens for a Sustainable Treasure Island, supra*, at p. 1046; *California Native Plant Society, supra*, 177 Cal.App.4th at pp. 986–987; *Association of Irrigated Residents, supra*, at p. 1391.) When that level of insufficiency of the EIR as an informational document has occurred, the agency has not proceeded in a manner required by law and reversal is required. (*Vineyard, supra*, 40 Cal.4th at 435, citing *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1220 (*Bakersfield Citizens for Local Control*.)

As the above overview reflects, in evaluating an EIR for CEQA compliance, “a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts.” (*Vineyard, supra*, 40 Cal.4th at p. 435.) In other words, “our choice of the proper standard of review depends upon identifying correctly whether the question concerning the adequacy of the EIR’s disclosures ... is a question of law or a question of fact.” (*Madera Oversight Coalition, supra*, 199 Cal.App.4th at p. 101.) To summarize the nature of our inquiry in deciding the standard of review: “[T]he omission of required information constitutes a failure to proceed in the manner required by law where it precludes informed decisionmaking by the agency or informed participation by the public. [Citation.] We review such procedural violations de novo. [Citation.] By contrast, we review an agency’s substantive factual or policy determinations for substantial evidence. [Citations.]” (*California Native Plant Society, supra*, 177 Cal.App.4th at p. 987.)

Here, it appears that appellant is essentially claiming that the City's findings, which were adopted in the course of approving the EIR and in making related CEQA determinations, were not based on substantial evidence in the record. In applying the substantial evidence standard, the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision. (*Laurel Heights, supra*, 47 Cal.3d at p. 393.) Under this standard, we may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. Nor may we weigh conflicting evidence and determine who we think has the better argument. Courts do not have "the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so." (*Ibid.*) Rather, "The agency is the finder of fact and we must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision." [Citation.] That deferential review standard flows from the fact that 'the agency has the discretion to resolve factual issues and to make policy decisions.' [Citation.]" (*California Native Plant Society, supra*, 177 Cal.App.4th at p. 985.)

CEQA's Guidelines define substantial evidence as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, § 15384, subd. (a).)

***B. Infeasibility Findings as to Certain Traffic Mitigation Measures***

According to appellant, the EIR is inadequate because the findings stated therein that certain mitigation measures were "infeasible" were not supported by substantial evidence in the administrative record. To put it differently, appellant asserts that there were feasible mitigation measures proposed that the City declined to impose without providing adequate explanation for that decision supported by substantial evidence. We

begin our discussion of this issue with an overview of what CEQA requires concerning mitigation measures and findings of infeasibility.

### ***1. The CEQA Mitigation Requirement***

“The core of an EIR is the mitigation and alternatives sections.” (*Citizens of Goleta Valley v. Board of Supervisors, supra*, 52 Cal.3d at p. 564.) An EIR must describe “feasible [mitigation] measures which could minimize significant adverse impacts.” (Guidelines, § 15126.4, subd. (a)(1).) “Mitigation” includes: “(a) Avoiding the impact altogether by not taking a certain action or parts of an action. [¶] (b) Minimizing impacts by limiting the degree or magnitude of the action and its implementation. [¶] (c) Rectifying the impact by repairing, rehabilitating, or restoring the impacted environment. [¶] (d) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action. [¶] (e) Compensating for the impact by replacing or providing substitute resources or environments.” (Guidelines, § 15370.) “Feasible” means “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” (Pub. Resources Code, § 21061.1; Guidelines, § 15364.) “Whether a mitigation measure ... is feasible ‘involves a balancing of various “economic, environmental, social, and technological factors.’” (*Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360, 381, citing *City of Del Mar v. City of San Diego* (1982) 133 Cal.App.3d 401, 417.)

In section 21002 of CEQA, the Legislature declared, “it is the policy of the state that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects ....” “Section 21002 has been described as a ‘substantive mandate that public agencies refrain from approving projects for which there are feasible alternatives or mitigation measures.’ (*Mountain Lion*

*Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134 (*Mountain Lion*.) This substantive mandate ‘is effectuated in section 21081.’ (*Ibid.*)” (*Friends of Kings River v. County of Fresno* (2014) 232 Cal.App.4th 105, 120.)

“Under [section 21081], a decisionmaking agency is prohibited from approving a project for which significant environmental effects have been identified unless it makes specific findings about alternatives and mitigation measures. [Citations.] The requirement ensures there is evidence of the public agency’s actual consideration of alternatives and mitigation measures, and reveals to citizens the analytical process by which the public agency arrived at its decision. [Citations.]” (*Mountain Lion, supra*, 16 Cal.4th at p. 134; accord, *Friends of Kings River v. County of Fresno, supra*, 232 Cal.App.4th at p. 120.) One such specific finding provided under section 21081 is that one or more mitigation measures identified in the EIR are determined to be “infeasible” due to “[s]pecific economic, legal, social, technological, or other considerations.” (§ 21081, subd. (a)(3).)

In summary, “[u]nder CEQA, ‘a public agency is not required to favor environmental protection over other considerations, but it must disclose and carefully consider the environmental consequences of its actions, mitigate adverse environmental effects if feasible, explain the reasons for its actions, and afford the public and other affected agencies an opportunity to participate meaningfully in the environmental review process.’ [Citation.] [¶] As relevant here, a project with significant environmental impacts may be approved only if the decisionmaking body finds (1) that identified mitigation measures and alternatives are infeasible and (2) that unavoidable impacts are acceptable because of overriding considerations. [Citations.]” (*California Native Plant Society, supra*, 177 Cal.App.4th at p. 982, citing *Federation of Hillside & Canyon Assns. v. City of Los Angeles, supra*, 126 Cal.App.4th at p. 1198.)

## **2. *The Necessity of Infeasibility Findings***

As we have explained, where an EIR has identified significant environmental effects that have not been mitigated or avoided, the agency may not approve the project unless it makes findings that “[s]pecific economic, legal, social, technological, or other considerations ... make *infeasible* the mitigation measures or alternatives identified in the [EIR].” (Pub. Resources Code, § 21081, subd. (a)(3), italics added; see Guidelines, § 15091, subd. (a)(3).) Such infeasibility findings “constitute the principal means chosen by the Legislature to enforce the state’s declared policy ‘that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects ....’” (*City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 350, quoting § 21002.) “If the agency finds certain alternatives to be infeasible, its analysis must explain in meaningful detail the reasons and facts supporting that conclusion. The analysis must be sufficiently specific to permit informed decision-making and public participation, but the requirement should not be construed unreasonably to defeat projects easily.’ [Citation.]” (*California Native Plant Society, supra*, 177 Cal.App.4th at p. 982.) An agency’s infeasibility findings must be supported by substantial evidence in the record. (Pub. Resources Code, § 21081.5; Guidelines, § 15091, subd. (b).)

## **3. *The City’s Infeasibility Findings***

In its traffic analysis, the EIR identified a number of intersections or roadway segments surrounding the location of the project site that would be impacted by the project to a significant degree during peak traffic hours, and other intersections or segments that would have such peak hour impacts based on a cumulative impacts analysis. Each intersection or roadway segment was analyzed in light of LOS criteria, based on such factors as increased volume of traffic or delays during peak hour traffic congestion, with technical thresholds of significance utilized by the City to determine

when an impact would be deemed to be significant. As to each such intersection or roadway segment for which a significant traffic impact was identified, potential mitigation measures were discussed in the EIR, such as installation of traffic signals, right turn lanes, adding lanes, implementing overlap phasing, lane restriping, real party's (or the project's) payment of fair share fees, or other options, depending on the particular location and traffic setting. In several instances, the proposed mitigation measures were adopted by the City, including use of fair share fee payments. In other instances, the City determined that proposed mitigation measures were infeasible for specified reasons.

To support its findings that certain mitigation measures were infeasible, a variety of supporting factors were set forth by the City. Which factor or factors were asserted in a particular instance depended on the respective intersection or segment involved and the nature of the mitigation measure being proposed. Among the several factors or grounds of infeasibility stated by the City were the following: (1) existing business establishments in some areas<sup>13</sup> weighed against acquiring additional right-of-way needed for certain road expansion measures; (2) one or more of the proposed measures would result in a conflict with General Plan standards<sup>14</sup> for circulation; (3) the project's contribution to traffic increases was too small to justify requiring it to build the entire improvement constituting the mitigation measure; (4) there were no identified funding sources for a proposed mitigation measure to be fully funded and successfully built when needed; and (5) another project was already required to build out one of the proposed

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<sup>13</sup> As noted by respondents, goal No. 7.b. of the General Plan allows the City to reject traffic improvements that will significantly impact adjacent properties, or that will have a significant adverse effect on the character of the community.

<sup>14</sup> We note the Guidelines expressly state that, for purposes of an EIR's analysis of project alternatives, consistency with the general plan is a factor. (See Guidelines, § 15126.6, subd. (f)(1).) Due to the importance of compliance with a general plan's fundamental policy elements, we assume that such consistency is likewise a relevant consideration for purposes of considering the feasibility of mitigation measures. (See, e.g., *City of Del Mar v. City of San Diego*, *supra*, 133 Cal.App.3d at pp. 415–416.)

intersection improvements (i.e., a traffic signal). The foregoing circumstantial and contextual information, recited as supporting grounds of infeasibility, was provided in the administrative record to the City in the form of staff reports and attachments, and was reiterated in the EIR. Along with these factors, the City was also aware of, and took into consideration, the magnitude of the estimated expense of each proposed mitigation measure and the proportionate share of the traffic impact attributable to the project. The cost estimates were largely provided in the first instance by appellant's traffic expert, although the City's traffic staff also supplied some of the financial estimates. For our purposes, the important thing is the City had that data before it and considered it.

By and large, the above facts and circumstances are among the type of considerations that should appropriately go into an agency's assessment of whether a measure is feasible or not. (See Pub. Resources Code, § 21061.1; Guidelines, § 15364 [“[f]easible” means “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors”].) At first glance, it appears there was substantial evidence in the record that potentially supported the infeasibility findings that were made by the City when it considered the proposed mitigation measures. Moreover, the City's findings in that regard are presumed correct and appellant has the burden of affirmatively demonstrating otherwise. “The decisions of the agency are given substantial deference and are presumed correct. The parties seeking mandamus bear the burden of proving otherwise, and the reviewing court must resolve reasonable doubts in favor of the administrative findings and determination.” (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497.)

Appellant falls short of meeting that burden, in part because of its unfocused briefing on this issue. Appellant's opening brief does not clearly identify the particular mitigation measure (or measures) claimed by appellant to have been erroneously deemed infeasible, nor does it recite the basis for the City's findings or adequately explain to this

court why appellant believes the City's findings in that specific matter lacked the support of any substantial evidence in the record. (See *Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 656 [the appellant has burden to demonstrate error by presenting legal authority and factual analysis on each point made, supported by appropriate citation to the material facts in the record].) Instead, appellant's opening brief makes a generalized argument, asserting error in the abstract while only briefly alluding to particular segments or intersections and particular mitigation measures. In a complex matter such as this, we believe that appellant has not met its burden on appeal. "As with all substantial evidence challenges, an appellant challenging an EIR for insufficient evidence must lay out the evidence favorable to the other side and show why it is lacking. Failure to do so is fatal. A reviewing court will not independently review the record to make up for appellant's failure to carry his burden." (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261,1266.) Further, merely incorporating by reference matters filed in the proceedings below (e.g., administrative letters of VRPA Technologies, appellant's traffic consultant) is not a substitute for adequately *briefing* the specific arguments. (*Keyes v. Bowen, supra*, at p. 656 ["The appellant may not simply incorporate by reference arguments made in papers filed in the trial court, rather than briefing them on appeal."].)

But even considering the merits of appellant's contentions, we are not persuaded that the City prejudicially abused its discretion in making its feasibility findings. The main thrust of appellant's argument is that the City should have found feasible certain of appellant's proposals that real party (or the project) be required to pay more impact fees (also called fair share fees) that would go toward the cost of improvements needed at several distinct intersections or segments of roadway as to which a significant traffic impact still remained. Appellant's position is apparently that, as a general principle, it is *always* feasible (as a mitigation method) to impose more monetary fees on a project, since the collection of any amount of additional funds will always constitute at least an incremental step in the direction of eventually having enough money to accomplish the

needed improvements. As explained below, we disagree with appellant's over-simplified approach to the extent that it amounts to a blanket rule that does not adequately account for other factors bearing on the issue of feasibility, including when fee-based mitigation is proposed.<sup>15</sup> In any event, as will be seen in the discussion below, the City's findings of infeasibility concerning the proposals to impose additional fair share fees on the project were adequately based on relevant factors that were supported by evidence in the record.

Of course, fee-based mitigation plans may be approved by an agency as a viable method of achieving mitigation in some circumstances. Under CEQA Guidelines, an EIR may determine that a project's contribution toward the cost of a proposed mitigation measure adequately mitigates the project's proportionate share of a particular cumulative impact: "An EIR may determine that a project's contribution to a significant cumulative impact will be rendered less than cumulatively considerable [(i.e., not significant)] ... if the project is required to implement *or fund* its fair share of a mitigation measure or measures designed to alleviate the cumulative impact." (Guidelines, § 15130, subd. (a)(3), italics added.) However, the same provision of the Guidelines further states that the lead agency "shall identify facts and analysis supporting its conclusion that the contribution will be rendered less than cumulatively considerable." (*Ibid.*) In other words, the EIR and the lead agency adopting it must be able to substantiate that the fee-based mitigation plan is reasonably likely to *actually accomplish* the means of effecting substantial mitigation (e.g., the completion of a proposed road improvement).

Consistent with this principle, courts addressing the issue have held that while some "unavoidable uncertainties" as to funding and implementation are generally allowed, "a commitment to pay fees without any evidence that mitigation will actually

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<sup>15</sup> We note that feasibility determinations properly involve a balancing of factors. (*Citizens Opposing a Dangerous Environment v. County of Kern, supra*, 228 Cal.App.4th at p. 381.) It is difficult to square appellant's blanket approach with this fact.

occur is inadequate.” [Citations.]” (*Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 938, quoting *City of Marina v. Board of Trustees of California State University*, *supra*, 39 Cal.4th at pp. 364–365.) There must be a plan, enforceable by the City, reasonably ensuring that sufficient traffic funding will actually be obtained and will accomplish the required mitigation. (*Tracy First v. City of Tracy*, *supra*, at p. 938.) In summary, a traffic impact fee may be found to be an appropriate form of mitigation only if it is “linked to a reasonable plan for mitigation” (*Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1122) and “sufficiently tied to the actual mitigation of the impacts of increased traffic” (*Save Our Peninsula*, *supra*, 87 Cal.App.4th at p. 141; accord, *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1189). As to the timing for completion of the improvement constituting the mitigation of traffic impacts, as long as there is a reasonable plan for actually realizing that mitigation feature, the plan may be deemed adequate under CEQA even if does not include a “time-specific schedule” for the accomplishment thereof. (*Save Our Peninsula*, *supra*, at p. 141). On the other hand, where the record supports a conclusion that the actual mitigation measure (e.g., a road or traffic improvement to be built through impact fees) could not be adequately funded and accomplished in a successful manner within a reasonable period of time, the measure may be deemed infeasible. (*Napa Citizens*, *supra*, 91 Cal.App.4th at p. 365; accord, *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 785.)

Here, the City’s traffic planning does incorporate the use of fair share fees to facilitate mitigation, which included imposing such fees on the project itself. As explained in the DEIR: “The City has a Capital Improvement Program (CIP) for improvements on Oakdale Road from Floyd Avenue to Sylvan Avenue. The CIP project includes improvements to the Oakdale Road and Floyd Avenue intersection that would add a southbound dedicated right turn lane, thereby resulting in two southbound through lanes. In addition, Oakdale Road will be widened to install a third northbound through

lane north of the Oakdale Road and Floyd Avenue intersection. The City CIP project improves the function of the intersection and partially mitigates the identified impact .... [¶] This intersection improvement project will be implemented as part of the City's CIP program and *the proposed project will contribute its fair share to the completion of the Oakdale Road CIP Project through the payment of Capital Facility Fees ....*" (Italics added.) Payment of such fees was made a condition of approval of the project. The FEIR provided further detail on how this would be applied. In regard to mitigation measure No. 3.3.1 (at Oakdale Road and La Forge Drive; intersection No. 6), the MMRP section of the FEIR stated: "Consistent with the City's CIP program, [real party] will provide a fair share contribution to the delineation of a westbound right turn lane at the Oakdale Road at LaForce Drive Intersection." In regard to mitigation measure No. 3.3.3 (at Oakdale Road and Floyd Avenue; intersection No. 8), it was stated that "Consistent with the City's CIP program, [real party] will provide a fair share contribution to the installation of a southbound right turn lane at the Oakdale Road at Floyd Avenue Intersection and the installation of a third northbound through lane north of the intersection."

Appellant believes that more should have been required, and its opening brief makes passing reference to intersections Nos. 3, 4 and 6, and to road segment No. 3 (as so numbered in the EIR), as examples of where the City allegedly erred in finding infeasible appellant's proposals to seek to accomplish mitigation through imposition of additional impact fees. Again, although we believe the briefing is inadequate to meet appellant's burden, we will briefly comment on these four matters. As to road segment No. 3 (which is the segment of Oakdale Road between Mable Avenue and Sylvan Avenue), appellant proposed widening the northbound segment of Oakdale Road by an additional lane, and it estimated the cost of this improvement at \$500,000. Since the project was expected to increase traffic by 5.4 percent at peak hours along this segment, appellant urged that the project (or real party) should be required to pay 5.4 percent of the

total cost of the improvement. The City rejected the proposal as infeasible based on several facts and circumstances. First, the unmitigated impact would only exist for an interim period because the improvement was already required to be constructed in association with the development of the nearby Tivoli project. Second, based on the small proportion of the project's impact (about 5.4 percent) relative to the overall cost of the improvement and the lack of an identified funding source that would be adequate to cover the remainder of the cost to complete the improvement in the short term, the City determined it was infeasible to expect to be able to successfully accomplish this improvement prior to its construction as part of the Tivoli project.

As to intersection No. 3 (Oakdale Road at Mable Avenue), which would operate at an unacceptable LOS F under cumulative conditions (during peak hours) even without the proposed project, the implementation of the project would contribute more than five percent to the service volume of an approach at peak hours and increase average intersection delay at that time of day. Actual mitigation to an acceptable LOS grade would require "delineation of eastbound and westbound right-turn lanes, addition of a second eastbound and westbound left-turn lane, addition of a fourth northbound and southbound through lane, addition of a second southbound left-turn lane, and right-turn overlap phases for the westbound and eastbound movements." The total cost was estimated at over \$2 million, and appellant proposed that the project pay a \$50,000 fair share fee towards the mitigation measures. The City rejected these extensive mitigation measures for several reasons, including that the lane additions/road expansions in that location would significantly exceed standards in the General Plan for collector street/principal arterial street intersections, which would result in General Plan inconsistency. Further, the addition of new lanes would also require the acquisition of additional right-of-way that would significantly impact existing development, which the record showed included a residence and veterinary hospital. Finally, the City observed that there was no identified funding source for the remainder of the costs involved for

accomplishing the proposed mitigation measures. Apparently, the City did not see how implementing a CIP or similar plan at this particular site would be able to generate sufficient funding to successfully accomplish the needed mitigation, nor was it aware of any other funding sources. As noted, a commitment to pay fees without any evidence that mitigation will actually occur is inadequate. (*Tracy First v. City of Tracy, supra*, 177 Cal.App.4th at p. 938.) Appellant has not shown any facts to the contrary. Similar types of factors, such as General Plan inconsistency, the need to obtain right-of-way that would interfere with existing business, and the lack of adequate funding sources to actually accomplish the mitigation, were cited by the City in rejecting mitigation measures for intersections Nos. 4 and 6.

While the City's discussions of its grounds for finding infeasibility in the above instances were far from perfect, and arguably should have been more specific, we believe they were not fatally deficient as to the presentation of adequate factual grounds to support the ultimate findings. The City's analysis did explain in meaningful detail the reasons and facts supporting the infeasibility conclusions, and the analysis was sufficiently specific to permit informed decision-making and public participation. Further, the particular factors cited by the City did appear to be supported by evidence in the administrative record, typically in the form of staff reports and attachments, and appellant has failed to convincingly demonstrate otherwise. We conclude that this particular attack on the City's approval of the project falls short.

### ***C. Evaluation of a Project Alternative***

Appellant challenges the analysis in the EIR of one of the project alternatives. Section 5.4.4 of the DEIR sets forth the evaluation comparing the project to the "Reduced Project Alternative" (alternative No. 4). Under the Reduced Project Alternative, a 12-acre shopping center development would be developed on the northern portion of the project site, and condominiums (66 units) and apartments (196 units) would be developed on the remaining six acres. The DEIR compared the various environmental effects of this

potential alternative with the project's anticipated effects, including with respect to aesthetics, air quality, biological resources, climate change, geology and soils, hazardous materials, hydrology and water quality, land use and urban decay, noise, public services and utilities, and traffic and circulation.

CEQA Guidelines provide that an EIR "shall describe a range of reasonable alternatives to the project ..., which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." (Guidelines, § 15126.6, subd. (a).) As to the level of analysis required, the Guidelines state: "The EIR shall include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project. A matrix displaying the major characteristics and significant environmental effects of each alternative may be used to summarize the comparison." (*Id.*, subd. (d).) Here, as indicated above, it is clear that the EIR complies with the applicable regulation.

The City reviewed the EIR's analysis and ultimately concluded in its findings that the Reduced Project Alternative would not adequately meet project objectives or be economically feasible. Therefore, the Reduced Project Alternative was rejected. The findings stated, among other things, that although the Reduced Project Alternative would slightly lessen some of the proposed project's significant impacts, it would not further respondents' objectives related to the scope and scale of the commercial component of the project because economic viability in the grocery store industry has necessitated an increasing size of grocery stores, with an increasing variety of goods and services offered. This, in turn, has led to increased shopping center sizes to maintain an economically viable ratio of grocery store to other retail space within the center. A further consideration affecting the viability of a smaller center at this location is the access restrictions that would result from application of the City's standards to the smaller site, which would result in only two driveway accesses to the smaller shopping

center. In making these findings, the City found credible the information from respondents, which provided further detailed analysis relating to economic viability. Substantial evidence in the record supported these findings. Indeed, as was aptly stated by the trial court in its ruling below, “[t]here is a reasonable inference that if the Project were reduced to 12 acres it would suffer the same fate as the other proposed projects suffered in 1981 and 1987.” Furthermore, consistent with CEQA (see § 21081), the City made findings in a statement of overriding considerations setting forth reasons for moving forward with the project despite there being some unmitigated impacts.

Based on what we have stated, it appears that the EIR and the City’s findings with respect to the Reduced Project Alternative complied with CEQA. The description and evaluation of this alternative was adequate, and the City properly considered that information but ultimately rejected the alternative as infeasible as specified within its findings that were based on substantial evidence in the record.

Nevertheless, appellant suggests that under Guidelines section 15126.2, subdivision (b), the EIR was inadequate as an informational document in its discussion of the Reduced Project Alternative. Preliminarily, we would point out that Guidelines section 15126.2 addresses the matters that should be discussed in an EIR regarding significant environmental impacts. *Another* section of the Guidelines—section 15126.6—is the one that is primarily applicable to the discussion of relevant project alternatives. As we have noted above, the EIR fully complies with section 15126.6. Appellant has failed to adequately explain, with discussion of legal authority, why an EIR that is in compliance with the specific provision that is directly applicable to the analysis of alternatives should nevertheless be deemed inadequate in regard to that analysis in the present case.

Although not altogether clear, it would appear that appellant is attempting to seize upon an isolated sentence in Guidelines section 15126.2, subdivision (b). That provision, after stating that an EIR should “[d]escribe any significant impacts, including those

which can be mitigated but not reduced to a level of insignificance,” further states that “[w]here there are impacts that cannot be alleviated without imposing an alternative design, their implications and the reasons why the project is being proposed, notwithstanding their effect, should be described.” We note that the EIR *did* provide this type of descriptive information in its discussion of the project’s significant environmental effects and potential mitigation, which subject areas would seem to be the probable context of the wording of Guidelines section 15126.2, subdivision (b), since it entails what should be considered *without* imposing an alternative design. Thus, appellant’s line of argument appears to be misplaced. In any event, appellant’s cursory mention of this issue fails to adequately demonstrate that the EIR is deficient under that provision, nor does appellant provide legal authority or cogent legal argument to support the provision’s application to the EIR’s discussion of the project alternative. Moreover, as already noted above, the EIR complies with the applicable Guidelines with respect to evaluation of alternatives. For all of these reasons, no prejudicial abuse of discretion on this issue has been demonstrated.

***D. Findings as to Urban Decay***

Appellant asserts that there was no substantial evidence in the record to support the EIR’s findings that the project would have no significant urban decay impacts. We disagree with appellant’s assertion, as we shall briefly explain.

While economic or social impacts of a project are not in themselves treated as significant environmental effects, CEQA is concerned with whether a project’s economic or social impacts will cause adverse physical changes in the environment. (Guidelines, § 15131.) For example, the economic or social impacts of a project could foreseeably result in a downward spiral of store closures and long-term vacancies that create physical deterioration to an urban environment, an impact usually referred to in CEQA parlance as “urban decay.” (*Bakersfield Citizens for Local Control, supra*, 124 Cal.App.4th at pp. 1204, 1212–1213 [EIR should have analyzed the potential urban decay impacts from

two regional big box retailers situated in relatively close proximity in a saturated retail market].)

Here, the DEIR analysis contained a description of the market setting, both in a regional and local level, including indications of improving market conditions and declining vacancy rates (as the City emerged from the past real estate recession) and statistical evidence that when vacancies arise in the City, there is a history of successful backfilling (or re-tenanting) of such vacant commercial space with new commercial uses. Where vacancies presently exist, a visual scoping indicated the properties remain well maintained. The project is not a regional supercenter, but more of a traditional anchor grocery store, only somewhat larger. It meets different needs and draws from a more limited trade area than such regional supercenters. After considering the size of the project, the market conditions, the history of backfilling in the City, the flexibility for some commercial spaces being repurposed, and the City's consistent enforcement of property maintenance ordinances, it was determined that the project would not result in significant urban decay impacts. The City's analysis in the EIR was supported by substantial evidence in the record, including City staff reports and testimony, other expert testimony, and an economic report from Terranomics. The City's findings were further supported by evidence and testimony of real party, as an experienced commercial developer familiar with both the retail market setting and the physical condition of existing shopping centers in the area.

Appellant puts more weight or credibility on other evidence, would want to see more exhaustive data, and disagrees with the City's conclusion. On review, such arguments are beside the point. In applying the substantial evidence standard, the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision. (*Laurel Heights, supra*, 47 Cal.3d at p. 393.) Under this standard, we may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable. Nor may we weigh conflicting evidence

and determine who we think has the better argument. (*Ibid.*) Since there was substantial evidence in the record to support the City's urban decay findings, appellant's argument fails.

***E. Statement of Overriding Considerations***

Appellant's final CEQA attack on the City's approval of the project is that the City's findings regarding the benefits of the project in its statement of overriding considerations did not have the support of substantial evidence in the record. Again, we disagree with appellant's assessment.

An agency must adopt a statement of overriding considerations when it approves a project in spite of significant, unavoidable environmental impacts. (Pub. Resources Code, § 21081, subd. (b); Guidelines, § 15093.) The agency must find, with respect to significant effects of the project, which were unavoidable, that "specific overriding economic, legal, social, technological, or other benefits of the project outweigh the significant effects on the environment." (§ 21081, subd. (b).) "The statement [of overriding considerations] reflects the 'final stage' in the agency's decisionmaking process." (*Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 356 (*Cherry Valley*)). It is intended to show the balance the agency struck in weighing the benefits of a proposed project against its unavoidable environmental risks. (*Id.* at p. 357.) The findings must be supported by substantial evidence in the record. (Guidelines, § 15093, subd. (b).) "A lead agency's decision to approve a project despite its significant environmental impacts is a discretionary policy decision, entrusted to it by CEQA, and will be upheld as long as it is based on findings of overriding considerations that are supported by substantial evidence." (*Cherry Valley, supra*, at p. 357.)

In its statement of overriding considerations, the City made findings that the benefits of the project outweighed unavoidable impacts. The specific benefits of the project referred to by the City in its findings included (1) economic development and job

creation; (2) creation of transportation and infrastructure improvements; (3) increase in tax revenues; and (4) the advancement of several General Plan policies.

In support of the finding that the project would spur economic development and job creation, there was substantial evidence in the record that the project was in an area of town currently underserved, in part because older grocery stores had relocated or closed and in part because the number of residents in the vicinity had significantly increased. Since there was a substantial market demand for the project within this area of town surrounded by residential neighborhoods that would be served by it, the City could reasonably infer that new jobs would be created.<sup>16</sup> The project would meet this demand and expand retail services in northeast Modesto, providing an opportunity for businesses to locate into modern and attractive commercial space. Based on the same factual basis, the City could also reasonably infer that once the anchor grocery store and other retail businesses were established at the project site, this increased development would expand the City's public revenues in terms of additional property and sales tax revenue.

On the issue of jobs and tax revenues, appellant maintains that a comprehensive market study had to be conducted to determine the precise number of jobs and tax dollars that would be generated, but it fails to cite any provisions of CEQA or the Guidelines for that proposition. In reality, CEQA only requires that the findings be supported by substantial evidence in the record. (Guidelines, § 15093, subd. (b).) Appellant also argues there is a potential risk that some jobs would simply represent workers coming from existing businesses that decided to relocate to the project's commercial shopping center. But even if that were true in the short run, the City has a history of successfully backfilling vacated stores with new tenants, as noted previously. We conclude there was

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<sup>16</sup> The precise number of jobs was not specified. One business person estimated that if Save Mart became the anchor tenant, it would bring 100 to 120 jobs. Appellant's traffic consultant factored into its analysis 90 retail and service employees.

substantial evidence in the record to support the City's findings that the project would indeed lead to job creation, economic growth and increased tax revenues.

Additionally, the project would plainly result in the construction of a number of needed and beneficial transportation improvements, including bus transit improvements. Infrastructure improvements to accommodate growth are a recognized benefit that can be relied upon in a statement of overriding considerations. (*Cherry Valley, supra*, 190 Cal.App.4th at p. 357.) The City's findings also cited certain General Plan policies that would be furthered. Although appellant characterizes the cited General Plan policies as too generalized to be a suitable consideration, it does not refute this factor. On balance, we conclude that the City's findings in support of its statement of overriding considerations were adequately supported by substantial evidence in the record. Although appellant disagrees with the City's final decision to balance the considerations involved in the way that it did, appellant has failed to show the City prejudicially abused its discretion.

#### DISPOSITION

The trial court's denial of the petition for writ of mandate and the resulting judgment in favor of City is affirmed. Each party shall bear their own costs on appeal.

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KANE, J.

WE CONCUR:

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HILL, P.J.

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SMITH, J.

Filed 7/1/16

**CERTIFIED FOR PUBLICATION**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIFTH APPELLATE DISTRICT**

**NARAGHI LAKES NEIGHBORHOOD  
PRESERVATION ASSOCIATION,**

**Plaintiff and Appellant,**

**v.**

**CITY OF MODESTO,**

**Defendant and Respondent;**

**BERBERIAN HOLDINGS, L.P.,**

**Real Party in Interest and Respondent.**

**F071768**

**(Stanislaus Super. Ct. No. 2006259)**

**ORDER GRANTING PARTIAL  
PUBLICATION**

**It appearing that part of the nonpublished opinion filed in the above entitled matter on June 7, 2016, meets the standards for publication specified in California Rules of Court, rule 8.1105(c), IT IS ORDERED that the opinion be certified for publication in the Official Reports with the exception of parts I.C., I.D., and II. of the Discussion.**

**KANE, J.**

**WE CONCUR:**

**HILL, P.J.**

**SMITH, J.**



**From:** susan buxton [mailto:ssbuxton@yahoo.com]  
**Sent:** Thursday, July 27, 2017 10:33 AM  
**To:** Joel Paulson  
**Cc:** Marico Sayoc; Rob Rennie; BSpector; Steven Leonardis; Marcia Jensen  
**Subject:** North 40 Conditions of Approval

Dear Joel,

In the event that the Council does grant the application, we request the following conditions of approval be added to any permits granted.

1. The applicant shall install MERV 16 air filters in all housing structures with non-operable windows and shall replace the filters at least three times a year.
2. Within ten days of the first tenant moving into the affordable housing structure, the applicant shall provide a daily shuttle service that runs at least six times per day between 8 AM and 8 PM with pickup and drop-off service from and to the project site. Further,
  - a. The service will provide transportation to and from at least the following locations: local retail areas in Los Gatos, Town of Los Gatos Senior Services, medical/dental appointment locations, and the closest VTA light rail station in Campbell;
  - b. The pickup and drop-off service will occur inside the project site, and not on the public streets surrounding the site;
  - c. The driver will be a at least 21 years of age and licensed to drive a shuttle bus;
  - d. The shuttlebus will have the capacity to seat at least 16 persons and wheelchairs;
  - e. The shuttlebus will be designed to accommodate persons with walkers and persons in wheelchairs;
  - f. The drop off and pick up hours will be spread throughout the day and evening; and
  - g. The applicant will provide routine maintenance for the shuttlebus
3. Prior to issuance of a certificate of occupancy, the applicant shall provide the planning director with a proposed copy of the CC&Rs that include hours of operation for the specialty market, all restaurants, the park, open spaces, the playground, any swimming pool, and for all deliveries, trash, and recycling pickups.

I would also like to add that the amendment process of the Specific Plan to improve the clarity and direction for developing the remainder of the North 40 property should begin as soon as possible. This can be done while applications are pending and therefore, approval of future applications should be postponed until the amendment process is complete.

Sincerely,  
Bob and Susan Buxton  
Los Gatos, California





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July 27, 2017

Joel Paulson  
Director of Community Development  
Town of Los Gatos  
110 E. Main Street  
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[jpaulson@losgatosca.gov](mailto:jpaulson@losgatosca.gov)

Re: Eden Housing Inc., et al v. Town of Los Gatos (Santa Clara County Superior  
Court Case No. 16-CV-300733)  
Town Council Agenda: August 1, 2017

Dear Mr. Paulson:

This letter is written on behalf of the Project Applicants SummerHill Homes, LLC, Grosvenor USA Limited, and Eden Housing, Inc. in response to certain public comment that has been raised about the Project. Submittal of this letter is not a waiver of our stated position that the Project must be evaluated based upon the existing record at the time of the last Town Council action on this Project on September 6, 2016.

In reviewing the written communications that have been submitted to the Town as posted on the Town's website as well as oral testimony offered at the July 24, 2017 Town Council hearing, it is clear that no new issues have been raised. Furthermore, none of the issues or testimony produced could serve as substantial evidence to justify the denial of the Project under the Court's writ. To comply with the "By Right" requirements of the Town's Housing Element, the mandatory provisions of the Density Bonus Law, and the requirements for decision making under the Housing Accountability Act, the Town should now move to approve the Project applications.

Joel Paulson  
July 27, 2017

### Questions Regarding Objective Standards

In its Decision and Judgment, the Court rejected the Town's findings for denial because they were not based on objective standards. Some of the previously raised subjective issues, like affordability and the spread of units, were once again raised in public testimony. The Court has already rejected these as bases for denial.

Town Council requested Staff to respond to the letter from Matthew Hudes that proposed his own, personal definition of "objective." Nothing in the letter contains evidence of a failure to comply with any objective standard of the Specific Plan. For example, (a) Mr. Hudes' letter points to various provisions of the Specific Plan that do not meet any possible legal definition of "objective," including those definitions proposed in the Staff Report or in my July 21, 2017 letter to the Town Council (e.g., the Specific Plan Area "should be treated with unique image, or 'brand'"); (b) his interpretation of the Design Guidelines is not correct (e.g., there is no mandatory requirement regarding orientation of commercial buildings (see Specific Plan page 3-1: "A guideline, which is denoted by the use of the word "should," is not mandatory."), but in fact they are indeed oriented towards streets as suggested); and (c) his suggestion to radically change the street layout would itself conflict with a major requirement of the Specific Plan.

### Issues of Public Health and Safety

The Town also received public input that claimed to raise objective issues of public health and safety. These comments were almost exclusively focused on traffic and air quality impacts, both of which were already studied extensively in the Environmental Impact Report for the North 40 Specific Plan. None of the material presented in writing or in public testimony satisfies the heavy burden imposed by the Housing Accountability Act. As Staff has repeatedly advised, Government Code Section 65889.5, subdivisions (j)(1) and (2) are very restrictive as to what evidence can be considered. They provide that findings of denial can only be made if:

*(1) The housing development project would have a specific, adverse impact upon the public health or safety unless the project is disapproved or approved upon the condition that the project be developed at a lower density. As used in this paragraph, a "specific, adverse impact" means 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.*

*(2) There is no feasible method to satisfactorily mitigate or avoid the adverse impact identified pursuant to paragraph (1), other than the disapproval of the housing development project or the approval of the project upon the condition that it be developed at a lower density.*

Based on the language from subdivisions (j)(1) and (2) above, the following are our responses to the issues that have been publicly discussed and why they cannot be used as bases for findings of denial.

Joel Paulson  
July 27, 2017

Traffic. Several speakers provided anecdotal accounts claiming that traffic has been getting worse in recent years. None of these claims constitute 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.”

Traffic impacts were fully analyzed in the Specific Plan EIR, and the Initial Study done for this Project concluded that the Project was covered in that EIR and that no further analysis was necessary. As the Town Attorney has repeatedly advised the Council: (a) CEQA cannot now be reopened; and (b) because of the “By Right” approval process specified for development in the North 40, the Project is not subject to CEQA anyway. Nonetheless, the applicants agreed to have an Initial Study conducted, which concluded that the Project complied with the certified EIR.

Several speakers also referenced subdivision (e) of the Housing Accountability Act, which requires compliance with Chapter 2.6 of the Government Code (commencing with Section 65088). That Code section is part of the legislation regarding the Congestion Management Program that was added by statute in 1989. The EIR for the Specific Plan specifically reviewed the requirements of the Congestion Management Program in evaluating traffic impacts of the Specific Plan. This is not new information and cannot be used as the basis for a finding of denial.

Air Quality. Several speakers also raised concerns about the air quality within the North 40. Again, this issue is not a new one and cannot be used as the basis for a finding of denial; it was studied intensively in the EIR for the Specific Plan. See Draft EIR pages 3-21 through 3-51 (2 AR 659-90). The health effect of locating housing on the site was exhaustively analyzed by the Town’s consultant Illingworth & Rodkin, who modeled and analyzed air quality concentrations on the North 40 site using the appropriate protocols of the Bay Area Air Quality Management District, the California Air Resources Board, and the U.S. EPA. They concluded that there was a mitagable health risk for a small section of the North 40 site at the southern edge along Route 17. The risk was mitigable to a level of insignificance by the installation of high efficiency filtration devices in the residential units in this area. That mitigation is incorporated into the Project, and, as a result, residential use in this area (as well as the rest of the Project area) was found to be a less-than-significant risk to public health or safety.

Some of the public also commented on a letter submitted to the Town by Dr. Marland concerning locating housing in proximity to freeways. These comments likewise do not constitute new information showing that the Project would have 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.”

The letter from Dr. Marland reargues the analysis already conducted in the EIR. He also cites an article in the New England Journal of Medicine that analyzes pollution impacts in some 39,716 zip codes within the United States. The article is a very high-level study of the relationship between air pollution and health impacts, but it actually does not discuss issues regarding living near a freeway; in fact, the words “freeway,” and “traffic” do not even appear in the article. He also claims that “in 2017 the CA Air Resources Board took the stand that no new housing should be

Joel Paulson  
July 27, 2017

closer than 500 feet to a freeway.” This is not correct. The California Air Resources Board has not imposed any such requirement. Its recommendations about how to analyze and mitigate potential health impacts of air pollution were analyzed in the North 40 EIR, as well as guidance from the BAAQMD and the U.S. EPA. Again, this is not new information and cannot be used as the basis for a finding of denial.

In summary, to date there has been no new information presented that could justify denial of the Project or approval at a lower density. We urge the Town to approve the Project as submitted.

Very truly yours,

BERLINER COHEN, LLP



ANDREW L. FABER

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Members of the Town Council  
Town Clerk  
Town Attorney  
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