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September 24, 2024

VIA E-MAIL

Joel Paulson
Community Development Director
Town of Los Gatos
110 E. Main Street
Los Gatos, CA 95030
Email: jpaulson@losgatosca.gov

Re: Formal Development Application Pursuant to the Builder's Remedy
980 University Avenue, Los Gatos
APNs 424-31-028 and 027

Dear Mr. Paulson:

Our clients 980 University, LLC, 980 JR, LLC, and 980 ER, LLC (collectively the "Applicant"), hereby submit a formal development application ("Formal Development Application") for a proposed housing development project at 980 University Avenue ("Property"), in the Town of Los Gatos ("Town"). The Applicant previously submitted a preliminary application ("Preliminary Application") pursuant to Senate Bill 330 ("SB 330") and the Builder's Remedy on April 5, 2024.¹

This letter and the enclosed information and materials constitute the submittal materials required by the Town's application forms and checklists for a formal development application, including the application forms for the architecture and site approval, vesting tentative map, tree removal permit, and other related documents. The permit processing fee will be provided separately via electronic payment upon receipt of the Town's invoice, which we would request the Town provide swiftly.² This Formal Development Application is being submitted in advance of the 180-day deadline provided in Government Code section 65941.1(d)(1).

¹ In a letter dated April 9, 2024, the Town confirmed receipt of the Preliminary Application as of April 5, 2024, but stated that Town determined the Preliminary Application was deemed submitted as of April 9, 2024, and that a formal development application is due by October 6, 2024.

² The California Department of Housing & Community Development ("HCD") recently issued a Letter of Technical Assistance to the Town, dated August 30, 2024, stating "the inconsistent lag time between application submittal and invoice payment is concerning" and directed the Town to "explore modifying its intake procedures for development applications of this type to provide an option for the applicant to pay the fee associated with the type of application being sought."

I. Town Housing Element and Project Description

The Town consistently has struggled to provide sufficient low-income housing units to meet its Regional Housing Needs Allocation (“RHNA”) pursuant to State Housing Element Law. During the 5th Housing Element Cycle, the Town’s low-income RHNA allocation was 112 units, and it only produced 14 low-income units for the entire period of 2015 to 2023.³ Based on its 6th Cycle RHNA, the Town must plan for a total of 1,993 housing units, including 310 low-income units and 826 above-moderate income units.⁴ The Site Inventory for the Town’s 2023-2031 Housing Element (“6th Cycle Housing Element”), adopted on June 20, 2024 and certified by HCD on July 10, 2024,⁵ lists 1954 total units, including 990 low-income units. According to its 2024 Annual Progress Report for the 6th Cycle, the Town has, however, permitted only three percent (60 units) of the required 1,993 units, even though 12.5 percent of the 6th Cycle has elapsed.⁶ The Town has permitted 11 low-income units and 25 above-moderate income units since January 31, 2023.⁷

The Town’s currently applicable 2020 General Plan Land Use Element⁸ designates the Property Light Industrial, and the Property is zoned “Controlled-Manufacturing (CM).” The Property is not listed on the Site Inventory of the Town’s 6th Cycle Housing Element.

The Applicant proposes to develop 68 multiple-family (townhouse) units on the approximately 4.04-acre Property (APNs 424-31-028 and 027), with associated amenities including an approximately 1,270 square foot play area, landscaping, utilities, and other infrastructure improvements. The townhouses consist of three different unit types: 3 bed/2.5 bath, 3 bed/3.5 bath, and 4 bed/3.5 bath. All units will have two-car garages. In addition, 14 guest parking spaces are proposed. The proposed multiple-family units would be located within 12 building groups (10 – six-unit buildings and 2 – four-unit buildings) as shown on the enclosed site plan. The proposed living area of the individual units ranges from approximately 1,905 to 2,247 square feet. The boundaries of individual units will be established through a condominium plan, and the community will be governed by a professionally managed homeowners association. The Property currently is developed with a 66,400 square foot office/R&D development that was constructed in 1968 and remodeled and expanded in 1986.

³ See HCD APR Dashboard. <https://www.hcd.ca.gov/planning-and-community-development/housing-open-data-tools/housing-element-implementation-and-apr-dashboard>

⁴ 2023-2031 Los Gatos Housing Element, p. 10-3.

⁵ See Los Gatos Housing Element webpage, <https://www.losgatosca.gov/1735/General-Plan---Housing-Element>; see also HCD Housing Element Compliance Report, <https://www.hcd.ca.gov/planning-and-community-development/housing-open-data-tools/housing-element-review-and-compliance-report>.

⁶ See footnote 3.

⁷ See footnote 3.

⁸ In response to a referendum, on April 2, 2024, the Los Gatos Town Council voted to rescind the 2040 Land Use Element and 2040 Community Design Element. As a result, the Town’s 2020 Land Use Element and Community Design Element are currently in effect.

The Applicant is utilizing the protections of the Builder's Remedy and intends to designate a percentage of the Project's multi-family units for lower income households, as required to qualify for Builder's Remedy under the Housing Accountability Act ("HAA") (Gov. Code § 65589.5). As a result, the Project is a housing development project for very-low, low-, and moderate-income households protected by the provisions of the HAA including without limitation the Builder's Remedy provisions. Last week the Governor signed into law amendments to the HAA under Assembly Bill 1893, including amendments specific to the Builder's Remedy, as well as revisions to the Housing Element Law under Assembly Bill 1886 that likewise impact Builder's Remedy. These revisions, some of which are declaratory of existing law, go into effect on January 1, 2025. The Applicant intends to rely on such amendments in processing this Project.⁹

The proposed Project's 68 new units would directly support the Town's progress toward its 6th Cycle RHNA targets by *more than doubling* the Town's progress in both the lower income and above-moderate income categories. Because these units are not listed on the Site Inventory, they would provide the Town with an additional buffer in its Housing Element.

The Applicant is seeking a vesting tentative subdivision map for condominium purposes, tree removal permit, and architecture and site approval, with review generally limited to compliance with applicable objective development standards in effect as of the date of this Preliminary Application and applicable state and federal law. As provided above, the Applicant is utilizing the protections of SB 330, the HAA including the Builder's Remedy, and the benefits of the Density Bonus Law, as described below.

II. Builder's Remedy Pursuant to the Housing Accountability Act

As previously provided in the cover letter to the Applicant's Preliminary Application, the Project is protected by the Builder's Remedy provisions of HAA. These provisions prohibit a city that does not have an adopted housing element that is substantially compliant with the Housing Element Law (Gov. Code § 65580 *et seq.*) from disapproving or conditioning in a manner that renders infeasible a housing development project "for very low, low-, or moderate-income households," even where the project is inconsistent with both the city's zoning ordinance and general plan land use designation.¹⁰ (Gov. Code § 65589.5(d)(5).) Projects for very low, low-, or moderate-income households are defined to include projects that provide 20 percent of

⁹ In the event the Town were to approve the Project on or before December 31, 2024 (prior to the effective date of Assembly Bill 1893), the Applicant would provide 20 percent of the total units as affordable to lower income households.

¹⁰ A city can disapprove such a project *only* if it makes written findings based on a preponderance of evidence in the record that (1) the city has an adopted, substantially compliant housing element and has met its Regional Housing Needs Allocation ("RHNA") requirements; (2) the project would have a specific adverse impact on health or safety that cannot be mitigated without rendering the project unaffordable or infeasible; (3) the denial or conditioning of the project is required to comply with state or federal law; (4) the project site is zoned for agriculture or resource preservation; or (5) the project is inconsistent with both the city's zoning ordinance and general plan land use designation and the city has an adopted, substantially compliant housing element. None of these findings apply to the Project or the Property.

the units for lower income households as defined in the HAA. (Gov. Code § 65589.5(h)(3).) Assembly Bill 1893 amends this definition to allow an eligible Builder's Remedy project to qualify by providing 13% percent of the total units as affordable to lower income households.

As the state agency delegated with "primary responsibility for development and implementation of housing policy" by the Legislature (Health & Safety Code § 50152) as well as enforcement authority over Housing Element Law and the HAA (Gov. Code § 65585(j)), HCD has clarified that "a jurisdiction does not have the authority to determine that its adopted element is in substantial compliance [i.e., "self-certify"] but [that a jurisdiction] may provide reasoning why HCD should make a finding of substantial compliance," and "a jurisdiction is 'in compliance [with Housing Element Law] as of the date of HCD's letter finding the adopted element in substantial compliance.'"¹¹ Recently, trial courts in three separate cases confirmed HCD's interpretations that a jurisdiction's housing element does not achieve substantial compliance until certified by HCD and that a "preliminary application" pursuant to SB 330 vests such noncompliance for the duration of the project entitlement process.¹² This month, Governor Newsom signed into law Assembly Bill 1886, which codifies these rules and provides they are declaratory of existing law. As such HCD, and only HCD, has the authority to certify the Town's 6th RHNA Cycle Housing Element as substantially compliant with Housing Element Law. Until HCD's July 10, 2024, certification, the Town's 6th Cycle Housing Element was not in substantial compliance with Housing Element Law.¹³

Because the Town did not have a substantially compliant 6th RHNA Cycle Housing Element on April 5, 2024, when the Preliminary Application was submitted, and the Project is a housing development project for very-low, low-, and moderate-income households, the Project is subject to the Builder's Remedy. Therefore, the Town cannot deny or condition approval of the Project in a manner that would render it infeasible, notwithstanding any inconsistency of the Project with the zoning ordinance and General Plan land use designation of the Property. In addition, jurisdictions may not require Builder's Remedy applicants to submit an application for either a General Plan Amendment or a rezone, as such a requirement is in effect a requirement for consistency and equivalent to an unlawful disapproval under the HAA, as confirmed by recent HCD guidance.¹⁴

¹¹ See HCD Memorandum to Planning Directors and Interested Parties dated March 16, 2023 (confirming that a jurisdiction's housing element is not in substantial compliance with Housing Element Law until HCD determines such), <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/memos/HousingElementComplianceMemo03162023.pdf>.

¹² See *California Housing Defense Fund v. City of La Cañada Flintridge*, Los Angeles Superior Court Case No. 23STCP02614, Order dated March 4, 2024; *600 Foothill Owner, LP v. City of La Canada Flintridge*, Los Angeles Superior Court Case No. 23STPC02575, Order dated March 4, 2024; *Jha v. City of Los Angeles*, Los Angeles Superior Court Case No. 23STCP03499, Order dated March 5, 2024; see also HCD Letter of Technical Assistance to City of La Cañada Flintridge dated June 8, 2023, available here: <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/la-canada-flintridge-nov-060823.pdf>.

¹³ See e.g., HCD Letter regarding Los Gatos Housing Element dated December 1, 2023, <https://www.losgatosca.gov/DocumentCenter/View/37076/December-1-2023-HCD-Findings-Comment-Letter>.

¹⁴ See e.g., HCD Letter to Beverly Hills dated June 26, 2024 <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/beverly-hills-hau-1071-losta-062624.pdf>; HCD Letter to Beverly Hills dated August 22, 2024.

III. Senate Bill 330

Effective January 1, 2020, SB 330 declared a statewide housing emergency (until 2030, as extended by Senate Bill 8) and amended the HAA and the Permit Streamlining Act (Gov. Code § 65920 et seq.) to facilitate the production of housing. During the housing emergency period, all cities are subject to specified project review requirements and timelines regarding applications for housing development projects. Because the Applicant submitted a Preliminary Application, the Project is entitled to the protections of SB 330, namely it shall be subject only to the ordinances, policies, and standards adopted and in effect when a preliminary application was submitted (Gov. Code § 65589.5(o)), and it is subject to a *maximum* of five public hearings prior to final action by the City (Gov. Code § 65905.5(a)). The filing of this Formal Application is within the 180-day period required by SB 330. (Gov. Code § 65941.1(d)(1).) Since submittal of the Preliminary Application, the Applicant has modified the building configuration and other elements of the site plan, however the change in the number of units (66 to 68) and the square footage of construction of the Project as revised are each *less than* 20 percent;¹⁵ the revisions therefore do not affect the SB 330 vesting of the Project. (Gov. Code, § 65941.1(c).)

The Town has 30 days review the enclosed Formal Development Application for completeness and provide a written completeness determination to the Applicant. (Gov. Code, §§ 65941.1(d); 65943.) While the Town is not precluded from making other consistency comments or information requests, any incompleteness letter should clearly separate items required for completeness from those that are not required for completeness.

If the timely Town determines the Formal Development Application to be incomplete, the Applicant will have 90 days from the date of the Town's incompleteness letter to submit the information required to complete the application, in accordance with the Permit Streamlining Act. (Gov. Code, § 65941.1(d).) HCD's recent Letter of Technical Assistance to the Town, dated August 30, 2024, clarified that the "90-day deadline restarts with each subsequent resubmittal by the applicant" and that the Town's prior interpretation that "there is a single finite 90-day review period is inconsistent with both the intent of the [Permit Streamlining Act] and the Legislature when it introduced this system in Senate Bill 330."¹⁶ Such an interpretation also conflicts with the recent Los Angeles Superior Court ruling in *Janet Jha v. City of Los Angeles, et al.*, in which the court ruled "that when an applicant receives an incompleteness determination pursuant to section 65943—not just the first incompleteness determination – an applicant has 90 days to respond."¹⁷

<https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/beverly-hills-hau-1071-nov-082224.pdf>

¹⁵ The building square footage in the Applicant's Preliminary Application for the 66 unit site plan was 165,888 square feet. As shown on the site plan submitted with this Formal Application for 68 units, the building square footage is 170,668 square feet, representing an increase of only 2.89%.

¹⁶ See footnote 2.

¹⁷ *Janet Jha v. City of Los Angeles et al.*, Los Angeles Superior Court Case No. 23STCP03499.

IV. Density Bonus Law

A. Eligibility for State Density Bonus Law Benefits

Pursuant to Builder's Remedy, the Town cannot deny the Project based on inconsistencies with the zoning ordinance and General Plan land use designation. In addition, because the Project would include more than 10 percent of the total units as restricted to lower income households, the Project is eligible for a density bonus, incentives/concessions, waivers or reductions of development standards, and specified parking standards pursuant to the State Density Bonus Law ("DBL"). (*See* Gov. Code, § 65915(b)(1)(B), (f)(2), (p).) To the extent the Town attempts to impose on the Project any objective standards that are not precluded by the HAA (including Builder's Remedy) and SB 330, the Applicant intends to invoke the benefits of the DBL. The Applicant currently anticipates use of waivers or reductions of development standards that would have the effect of physically precluding construction of the Project and incentives or concessions that result in identifiable, actual cost reductions to provide for affordable housing, as identified below. The Applicant reserves the right to identify further requests for incentives or concessions, waivers or reductions of development standards, parking reductions, or other benefits pursuant to the DBL as the Project applications progress.

B. Waivers Under the State Density Bonus Law

The DBL provides that "an applicant may submit to a city...a proposal for a waiver or reduction of development standards that will have the effect of physically precluding the construction of a development" that is entitled to the benefits of the DBL. (Gov. Code, § 65915(e)(1).) A "development standard" is defined broadly as "a site or construction condition, including, but not limited to, a height limitation, a setback requirement, a floor area ratio, an onsite open-space requirement, a minimum lot area per unit requirement, or a parking ratio that applies to a residential development pursuant to any ordinance, general plan element, specific plan, charter, or other local condition, law, policy, resolution, or regulation that is adopted by the local government or that is enacted by the local government's electorate exercising its local initiative or referendum power, whether that power is derived from the California Constitution, statute, or the charter or ordinances of the local government." (Gov. Code, § 65915(o)(2).) An applicant is not limited in the number of waivers that may be requested and granted. (Gov. Code, § 65915(e)(1).) Waivers can be requested for "any development standard that will have the effect of physically precluding the construction of a development" that meets the DBL's minimum affordable requirements "at the densities or with the concessions or incentives permitted by [the DBL]." (*Id.*)

A local government may deny a requested waiver only in specified circumstances. Specifically, a local government may deny a requested waiver only if granting the waiver "would have a specific, adverse impact ... upon health or safety, and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact" or "would have an adverse impact on any real property that is listed in the California Register of Historical Resources or that would be contrary to state or federal law. (Gov. Code, § 65915(e)(1).) 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.” (Gov. Code, § 65589.5(d)(2).) Conditions that would have a specific, adverse impact upon the public health and safety “arise infrequently.” (Gov. Code, § 65589.5(a)(3).)

Effective January 1, 2024, the DBL explicitly establishes that a local government cannot require “an applicant to provide reasonable documentation to establish eligibility” for a requested waiver or reduction of a development standard. (*See* amendments to Gov. Code, § 65915(a)(2) made by Assembly Bill 1287.) This amendment conforms with a technical assistance letter issued by HCD articulating that the “showing or ‘reasonable documentation’ required by the applicant is that the project qualifies for a density bonus.”¹⁸ HCD also has concluded that “[a] project that meets the requirements of the [DBL] is entitled to waivers if they are needed, ‘period.’” (*Id.*, quoting *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1346-47.)

A recent California Court of Appeal case further confirmed that a local government cannot deny a requested waiver based on whether a developer could have designed its project in a way that minimizes the need for requested waivers. (*Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755.) In *Bankers Hill 150*, project opponents claimed that the project could be redesigned to be more consistent with the city’s development standards and therefore the city should have denied the requested waivers. The Court of Appeal rejected that argument, holding that the city could not demand the developer to redesign its building to better meet the city’s development standards *even if* a design existed that would allow fewer deviations than the proposed project. (*Id.* at 775.)

The Project meets the DBL eligibility requirements for waivers. Further, none of the specified conditions that would allow the Town to deny the requested waivers apply. To the Applicant’s knowledge, the Property is not listed in the California Register of Historical Resources and none of the currently requested waivers, identified below, would have a specific, adverse impact on health or safety or would be contrary to state or federal law.

1. Subdivision Ordinance

To the extent that the Town takes the position that the Town’s Subdivision ordinance contains objective standards that apply to the Project, the Applicant intends to utilize a waiver to reduce the minimum right-of-way widths for alleys from 30 feet to 24 feet. (Los Gatos Municipal Code (“LGMC”) § 24.50.020.) The Project does comply with the minimum roadway width for alleys. Application of the right-of-way width standard would result in a direct loss in the number of units that could be accommodated on the Project site. The Applicant may utilize additional waivers to certain requirements of Municipal Code Chapter 24, Subdivision Regulations except to the extent compliance with a requirement is required under state or federal law.

¹⁸ See HCD’s Notice of Violation Letter to the City of Encinitas (Jan. 20, 2022), available at <https://www.hcd.ca.gov/community-development/housing-element/docs/sdiencinitas-nov-012022.pdf>.

2. *Below Market Price Ordinance and Guidelines*

The Project complies with the Town's Below Market Price Ordinance ("BMP Ordinance") and BMP Program Guidelines ("BMP Guidelines") by providing at least 11 units as affordable to lower income households, which slightly exceeds the number of affordable units that would be required under the Town's formula. (LGMC, § 29.10.3025.)¹⁹ To the extent that the Town takes the position that its BMP Ordinance and Guidelines contain objective standards that apply to the Project, the Applicant intends to utilize a waiver of the Town's BMP Guidelines to allow the Project to designate all below market price units as affordable to lower income households.²⁰ The Applicant may seek additional waivers under the DBL for certain requirements of the BMP Ordinance and BMP Guidelines.

3. *Objective Design Standards For Multi-Family Residential Development*

To the extent that the Town takes the position that the Town's Objective Design Standards and Guidelines For Qualifying Multi-Family and Mixed-Use Residential Development contain objective standards that apply to the Project, the Applicant intends to utilize a waiver of standard B.1.2, which requires upper floors above two stories to be set back by a minimum of five feet from the ground-floor façade. Compliance with this condition would result in a loss of 6,068 square feet, equivalent to 3 units. As the Project applications progress, the Applicant may identify additional waivers or reductions in development standards under the DBL in addition to those listed here.

4. *Multiple-Family (R-M) Zone District Standards*

Based on the Project proposed, the Town's Multiple-Family (R-M) Zoning District standards are the "best fit." To the extent that the Town takes the position that the Town's Multiple-Family (R-M) Zoning District contains objective standards that apply to the Project, the Applicant intends to utilize a waiver of standards pertaining to: (1) the 30-foot maximum height requirement to allow the Project's building height of 37'4", (2) a reduction in front, rear and side setbacks, (3) a reduction in building to building distances, and (4) the lot coverage requirement. (See LGMC, § 29.40.605 *et seq.*) Application of these requirements would result in a loss of units. In addition, the height waiver is needed to facilitate the Project's compliance with Objective Design Standard B.3.1 pertaining to horizontal eave breaks. As the Project applications progress, the Applicant may identify additional waivers or reductions in development standards under the DBL in addition to those listed here.

¹⁹ The Town's BMP formula for projects with 20-100 units provides: Number of BMP units = .225 (total # market rate units) – 2.5. Only where the calculation of BMP units results in a fraction of one-half or more, is the total number rounded up to the next unit. Based on this formula, the Project will provide 57 market rate units and 11 BMP units ((57 market rate units x .225) - 2.5 = 10.3).

²⁰ In addition, under the recent amendments in AB 1893, the Town may not impose a 50/50 low-income/moderate unit mix on Builder's Remedy projects as provided in new subsection (f)(6)(G)(i) of Section 65589.5 of the Government Code as revised by AB 1893.

5. *Bicycle and Pedestrian Master Plan*

To the extent that the Town takes the position that the Town's Bicycle and Pedestrian Master Plan contains objective standards that apply to the Project, the Applicant may utilize waivers under the DBL for certain requirements.

C. *Parking Reduction Under the State Density Bonus Law*

Under the DBL, the Applicant is entitled to provide "a vehicular parking ratio, inclusive of parking for persons with a disability and guests" consisting of 1.5 parking spaces for each two or three-bedroom unit, and 2.5 parking spaces for each four- or more bedroom unit. (Gov. Code, § 65915(p).) The Project's 68 units consist of 44 three-bedroom units (66 parking spaces required) and 24 four-bedroom units (60 parking spaces required). The Project will provide 136 covered parking spaces in the 2-car garages and 14 additional guest parking spaces.

D. *Incentives or Concessions Under the State Density Bonus Law*

The DBL provides that "[a]n applicant for a density bonus may submit to a city ... a proposal for specific incentives or concessions that the applicant requests..." (Gov. Code, § 65915(d)(1).) A 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 ..., 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 and actual cost reductions, to provide for affordable housing costs ... or ... rents

(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 ... that result in identifiable and actual cost reductions to provide for affordable housing costs or ... rents (Gov. Code, § 65915(k)(1).)

An applicant is entitled to one incentive or concession for projects that include at least 10 percent of the total units for lower income households, and two incentives or concessions for projects that include at least 17 percent of the total units for lower income households. (Gov. Code, § 65915(d)(2)(A)-(B).) In addition, under the amendments to Builder's Remedy in AB 1893, a

project applicant that qualifies for a density bonus shall receive two incentives or concessions in addition to those granted under the DBL.²¹

A local government may deny a requested concession or incentive only in specified circumstances. Specifically, a local government may deny a requested incentive or concession only if the incentive concession (a) “does not result in identifiable and actual cost reductions ... to provide for affordable housing costs ... or rents;” (b) “would have a specific, adverse impact [as defined above] ... upon public health or safety 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;” or “would be contrary to state or federal law.” (Gov. Code, § 65915(d)(1).)

In addition to modification or elimination of development standards, incentives and concessions can be applied to modify or eliminate other provisions of a city’s municipal code, including requirements of a local inclusionary ordinance.²² When considering a request for an incentive or concession, cities should not take an “unacceptably narrow view of cost savings” and must “consider documentation provided by developer” regarding potential cost savings to the housing project.²³ The applicant *is not* required to produce a pro forma or other documentation proving the incentive is required “to make the project economically feasible,” nor is the applicant “required to establish that cost reductions will result. Instead, ‘[t]he city . . . shall bear the burden of proof for the denial of a requested concession or incentive.’” (*Schreiber v. City of Los Angeles* (2021) 69 Cal.App.5th 549, 555, 557, quoting Gov. Code, § 65915(d)(4).)

Because the Project would include a minimum of 11 lower income units, the Project is eligible for at least one incentive or concession under the DBL, and as mentioned above, an additional two incentives and concessions under Assembly Bill 1893. Further, none of the specified conditions that would allow the Town to deny the requested incentives or concessions apply. As noted above, to the Applicant’s knowledge, the Property is not listed in the California Register of Historical Resources, and the currently contemplated concessions or incentives, identified below, would not have a specific, adverse impact on health or safety or be contrary to state or federal law.

At this time our clients reserve the right to utilize incentives or concessions with respect to requirements of the Town’s Subdivision and Property Development ordinances, BMP ordinance and guidelines, Objective Design Standards For Qualifying Multi-Family and Mixed-Use Residential Development, R-M Zone standards, and/or Bicycle and Pedestrian Master Plan where such incentives or concessions would provide identifiable and actual cost reductions to provide for affordable housing costs, except to the extent compliance with a requirement is required by state law.

²¹ See new section (f)(6)(C) of Government Code section 65589.5 as amended by AB 1893.

²² See [HCD Letter to San Jose](#) dated Dec. 14, 2021; [HCD Letter to Santa Ana](#) dated Apr. 27, 2023; [HCD Letter to West Hollywood](#) dated Sep. 2, 2022.

²³ See [HCD Notice of Violation](#) to City of Elk Grove dated Oct. 12, 2022.

V. Conclusion

The Applicant looks forward to working in cooperation with the Town to provide much needed housing, including affordable housing, to the community pursuant to critical state laws that are designed to facilitate housing production. The Applicant would be happy to discuss the Project or the Formal Application materials with you at any time.

Sincerely,

Cox, Castle & Nicholson LLP



Arielle O. Harris

cc: Jim Rees
Erik Hallgrimson
Nick Kosla
Robert Connolly
Andrew Gunson