DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT
2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov

December 16, 2021

Deanna M. Chow
Assistant Community Development Director
City of Menlo Park
City Hall – 1st Floor
701 Laurel Street
Menlo Park, CA 94025

RE: 123 Independence Housing Project – Letter of Technical Assistance

Dear Deanna M. Chow:

The purpose of this letter is to provide technical assistance regarding the 123 Independence housing project (project), which is proposed within the City of Menlo Park (City). This technical assistance was developed, in part, based upon conversations with Nira F. Doherty, City Attorney, you, and the project applicant. The California Department of Housing and Community Development (HCD) understands that there are questions regarding the application of Government Code section 65589.5, subdivision (o)(2)(E), to the project, and this letter is to provide assistance with the interpretation of that subdivision. HCD recognizes the challenge of interpreting ever-changing housing and land use laws and appreciates the opportunity to provide technical assistance.

We understand that on January 29, 2020, a preliminary application prepared pursuant to Government Code section 65941.1 was submitted for the 383-unit project. After the preliminary application was submitted; however, the applicant amended the project to increase the residential units to 432 units. The increase in units results in a less than 20 percent change from the original application. HCD understands that there may be some confusion over the implementation of section 65589.5, subdivision (o)(2)(E), in this circumstance.

Generally speaking, the effect of a preliminary application is to prohibit the application of newly enacted ordinances, policies, or standards to the project after the date the application was submitted. (Gov. Code, § 65589.5, subd. (o)(1).) However, subdivision(o)(2)(E) provides that an application shall not be considered a "preliminary application" where:

> The housing development project is revised following submittal of a preliminary application pursuant to Section 65941.1 such that the number of residential units or square footage of construction changes *by*

> *20 percent or more*, exclusive of any increase resulting from the receipt of a density bonus, incentive, concession, waiver, or similar provision. For purposes of this subdivision, "square footage of construction" means the building area, as defined by the California Building Standards Code (Title 24 of the California Code of Regulations).

(Gov. Code, § 65589.5, subd. (o)(2)(E), emphasis added.) Thus, when an application increases its residential units or square footage by 20 percent or more, the application no longer may be considered a "preliminary application" and no longer receives the benefits for such an application under section 65589.5, subdivision (o)(1).

As we understand it, the City contends this provision also applies to applications with changes *that are less than or smaller than 20 percent*. As to those applications, the City understands that the original application would still be considered a "preliminary application" and only subject to the ordinances, policies, and standards in effect when the application was submitted, but as to the increased square footage or units, the City believes new ordinances, policies, and standards may be applied. HCD disagrees with this interpretation.

In providing technical assistance, HCD first and foremost remains mindful of the interpretive directives of the Legislature: "It is the policy of the state that this section be interpreted and implemented in a manner to afford the fullest possible weight to the interest of, and the approval and provision of, housing." (Gov. Code, § 65589.5, subd. (a)(2)(L).) The purpose of freezing the applicable standards is to foster housing by increasing certainty for housing applicants, designers, and investors as to the ordinances, policies, or standards that must be complied with in a development.

The City's interpretation; however, would subject a single housing development to two sets of development standards. The parts of the housing development submitted with the preliminary application would be subject to one standard, while the additional square footage or units would be subject to other—potentially conflicting—development standards. In a worst-case scenario, the standards could not be reconciled; in such case, this interpretation would effectively render the preliminary application worthless and strip the statute of its effectiveness. Even in a more typical scenario, such an interpretation would undermine certainty for housing applicants, designers, and investors, rendering the housing more costly if not infeasible. Further, processing an application for a development applying two distinct sets of development standards would likely increase the time required to consider and approve the project, delaying the ultimate development of housing. Thus, this interpretation would not be consistent with the legislative directive to interpret and implement the statute to give the fullest possible weight to the interest of, and the approval and provision of, housing.

Other interpretive considerations result in a similar conclusion. For instance, ordinary principles of statutory interpretation strongly suggest that when a statute includes a list

of specific items, that list is presumed to be exclusive; the statute applies only to the listed items and not to others. (*Dean v. Superior Court* (1998) 62 Cal.App.4th 638, 641 ["The expression of some things in a statute necessarily means the exclusion of other things not expressed."].) Subdivision (o)(2) of the statute calls out five specific circumstances in which newly enacted ordinances, policies, or standards may apply to a project after the date the preliminary application was submitted:

(1) When fee increases result from an automatic annual adjustment based on an independently published cost index referenced in the ordinance adopting the fee;

(2) When a preponderance of the evidence in the record establishes that subjecting the housing development project to an ordinance, policy, or standard beyond those in effect when a preliminary application was submitted is necessary to mitigate or avoid a specific, adverse impact upon the public health or safety, as defined in Subdivision (j)(1)(A), and there is no feasible alternative method to satisfactorily mitigate or avoid the adverse impact;

(3) When necessary to mitigate impacts pursuant to the California Environmental Quality Act;

(4) When the project has not commenced construction within three years of the date of final approval; and

(5) When the project is revised such that the number of units or square footage changes by 20 percent or more (exclusive of increases from a density bonus or related concession).

(Gov. Code, § 65589.5, subd. (o)(2)(A)-(o)(2)(E).) The Legislature very carefully crafted these exceptions. It is HCD's opinion that since subdivision (o)(2) contains these five statutory exceptions—but does not mention those aspects of the preliminary application revised after its submission that do not result in a 20-percent change—the Legislature did not intend for these aspects to be included.

Section 65589.5, subdivision (o)(3) does not set out a separate category of exceptions. Rather, it clarifies that where a project is modified after its submission such that the number of units or square footage changes by less than 20 percent, the local agency can apply the ordinances, policies, and standards adopted and in effect when the preliminary application was submitted to those changes. (Gov. Code, § 65589.5, subd. (o)(3).) This means that the entirety of the project would be subject to the same ordinances, policies, and standards.

The legislative history indicates that the Legislature understood when these relatively minor changes (less than 20 percent) were made, the entire revised project would be subject to the same ordinances, policies, and standards adopted and in effect when

the preliminary application was submitted. For example, please see Senate Committee on Housing, Analysis of Senate Bill No. 330 (2019-2020 Reg. Sess.), as amended April 4, 2019 at page 6 [“Allows a local agency to subject new square footage or units to the ordinances, policies, and standards in effect when the complete initial application is submitted.”]; Senate Rules Committee, Floor Analysis of Senate Bill No. 330 (2019-2020 Reg. Sess.), as amended August 19, 2019 page. 7 [“Allows a local agency to subject new square footage or units to the ordinances, policies, and standards in effect when the preliminary application is submitted.”].

Likewise, the Legislative Counsel interprets these provisions such that a new application would be triggered only when the changes to the project were 20 percent or more. According to the Legislative Counsel’s Digest: “After the submittal of a preliminary application, the bill would provide that a housing development project would not be deemed to have submitted a preliminary application under these provisions if the development proponent revises the project such that the number of residential units or square footage of construction changes by 20 percent or more until the development proponent resubmits the information required by the bill so that it reflects the revisions. The bill would require a development proponent to submit an application for a development project that includes all information necessary for the agency to review the application under the Permit Streamlining Act within 180 days of submitting the preliminary application.” (Legis. Counsel's Dig., Sen. Bill No. 330 (2019-2020 Reg. Sess.) Stats. 654, § 3.) Again, this suggests that where the application is expanded by less than 20 percent, such reapplication is unwarranted.

HCD appreciates the opportunity to provide information and assist the City in its interpretation of statute. Please feel free to contact Fidel Herrera, of our staff, at fidel.herrera@hcd.ca.gov with any questions.

Sincerely,

Melinda Coy
Senior Housing Accountability Manager