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

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Tamsen Plume, Partner
Holland and Knight
50 California Street, Suite 2800
San Francisco, CA 94111

Tom Williams, City Manager
City of Millbrae
621 Magnolia Avenue
Millbrae, CA 94030

Dear Tamsen Plume and Tom Williams:

RE: Housing Accountability Act and Density Bonus Law

The purpose of this letter is to assist the City of Millbrae (City) in the implementation of the Housing Accountability Act (Gov. Code, § 65589.5) and State Density Bonus Law (Gov. Code, § 65915) as they relate to the proposed Anton Millbrae project located at 1100 El Camino Real. The proposed Anton Millbrea project is a 384-unit multi-family housing development, which will provide 19 units (5 percent) for very-low income households. The project has a proposed density of approximately 69 units per acre (du/acre) and includes an application for waivers under State Density Bonus Law related to the height and allowable unit per square feet development regulations within the Zoning Code. The site is zoned R-3 and designated High Density Residential in the City's General Plan.

The California Department of Housing and Community Development (HCD) understands that both the developer and the city are seeking guidance on the following two questions:

- Is the developer required to ask for a bonus *in units* under State Density Bonus Law in order to access the "maximum allowable residential density" under the general plan and/or other State Density Bonus Law incentives?
- Under the Housing Accountability Act and Density Bonus Law can the City require the development to rezone the property to Planned Development in order to achieve the proposed residential density?

In order to provide guidance, HCD considered the following information:

- General Plan Policy LU1.2 establishes "guidelines" to provide a "starting point" for "establishing" allowable residential densities. Among other things, it notes that the "high end" of residential density is achievable with a planned development zoning designation, among other criteria. In this context, "high end" is undefined.
- General Plan Policy LU3.3 states that specific standards for development, such as height, setbacks, and lot coverage, are established by the zoning provisions of the Municipal Code. The designation for High Density Residential in General Plan Policy LU3.3(d) states that the density is usually associated with multi-family structures of 40 units per acre, but the highest density is associated with buildings up to six stories.
- Under the General Plan Policy LU3.3(d), the High Density Residential land-use designation applicable to the project site allow for residential units up to 80 du/acre.
- The property is zoned "R-3" or "Multifamily Residential," but the Zoning Code does not explicitly establish the maximum allowable density per acre. (Millbrae Municipal Code, §10.05.0820.) The Zoning Code does contain a variety of specific development standards that effectively limit the density that can be achieved through these standards.
    - For instance, the R-3 zoning designation establishes a development regulation limiting the site to one unit per 1,000 square feet and a height limit of 40 feet, which effectively limits development to 43 du/acre. (Millbrae Municipal Code, §10.05.0820.D.)

Question #1 Is the developer required to ask for a bonus in units under the State Density Bonus Law in order to access "maximum allowable residential density" under the general plan and/or other State Density Bonus Law incentives?

No. The State Density Bonus Law contains several incentives that are designed to aid in housing developments that include affordable housing, including a possible bonus in the number of units beyond the maximum otherwise allowed as well as concessions and waivers. A developer need not utilize all incentives. In fact, the law was specifically amended to make clear that a developer need not seek a bonus in units beyond the maximum before seeking to apply other incentives to facilitate housing development.

State Density Bonus Law defines a "density bonus" to mean "a density increase over the otherwise maximum allowable gross residential density as of the date of application by the applicant to the city, county, or city and county, or, if elected by the applicant, a lesser percentage of density increase, including, but not limited to, *no increase in density*." (Gov. Code, § 65915, subd. (f), emphasis added.) This subdivision reflects a change in the law in 2016 that clarified that a developer may proceed under the State

Density Bonus Law, accessing its benefits, even if no increase in density is sought. (Chapter 758, Statutes of 2016 (AB 2501, Bloom)).[1]

For purposes of Density Bonus Law, "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. If the density allowed under the zoning ordinance is inconsistent with the density allowed under the land-use element of the general plan, the general plan density shall prevail. (Gov. Code, § 65915, subd. (f)).

As HCD understands it, the City believes that these provisions are irrelevant because the developer has not expressly sought an increase in units beyond the maximum allowed. That is not a requirement under the law. As noted above, since 2016, "no increase in density" is an option under State Density Bonus Law. Even if a developer has not asked for a density increase beyond the maximum allowable residential density, the developer is entitled to incentives such as concessions and waivers to facilitate the proposed development.

The general plan specifically provides for allowable densities up to 80 du/acre, while the zoning ordinance includes no similar provision and only limits density based on development standards. When development standards restrict the ability of a development to achieve the maximum allowable residential densities or a less dense development, a developer can submit a proposal for, for instance, a waiver from, or reduction of, development standards that have the effect of physically precluding those densities pursuant to Government Code section 65915, subdivision (e)(1).

Question #2 Under the Housing Accountability Act and Density Bonus Law, can the city require the development to rezone the property to Planned Development in order to achieve the proposed residential density?

No. The jurisdiction cannot require the project to be rezoned to a Planned Development Designation without risk of violation of the Housing Accountability Act and Density Bonus Law.

[1] Before this change, the law was arguably ambiguous. Some jurisdictions interpreted the law so as to allow a developer to operate under the State Density Bonus Law even without an express request to increase density beyond the maximum (See Assem. Com. on Housing and Community Development, Analysis of Assembly Bill 2501 (2015-2016 Reg. Sess), page 7); other jurisdictions, including apparently Millbrae, took the opposing view.

Housing Accountability Act

If a housing development project complies with applicable, *objective* general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete, the Housing Accountability Act prohibits a jurisdiction from disapproving a housing development project or requiring a project be developed at a lower density unless it makes specific statutory findings supported by a preponderance of the evidence in the record. (Gov. Code, § 65589.5, subd. (j)(1)). The receipt of a density bonus does not constitute a valid basis on which to find a proposed housing development project is inconsistent, not in compliance, or not in conformity, with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision (Gov. Code, § 65589.5, subd. (j)(3)).

AB 3194 (Chapter 243, Statutes of 2018) recently amended the Housing Accountability Act to state:

> For purposes of this section, a proposed housing development project is not inconsistent with the applicable zoning standards and criteria, and shall not require a rezoning, if the housing development project is consistent with the objective general plan standards and criteria but the zoning for the project site is inconsistent with the general plan. If the local agency has complied with paragraph (2), the local agency may require the proposed housing development project to comply with the objective standards and criteria of the zoning which is consistent with the general plan, however, the standards and criteria shall be applied to facilitate and accommodate development at the density allowed on the site by the general plan and proposed by the proposed housing development project (Gov. Code, § 65589.5, subd. (f)(4)).

Further SB 330 (Chapter 654, Statutes of 2019) defined the word “objective” to mean:

> involving no personal or subjective judgment by a public official and being uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and the public official (Gov. Code, § 65589.5, subd. (h)(8)).

Accordingly, it appears that as long as the Anton Millbrae project meets the *objective* standards of the General Plan and Zoning Code (inclusive of the requested modifications to the zoning standards authorized pursuant to Density Bonus Law), the City cannot find the development to be inconsistent with the Zoning Code or mandate it be rezoned to planned development.

Currently, the City has only one zone (R-3) to implement the General Plan’s high-density land-use designation, which—while not explicitly stating a maximum allowable

density—establishes limits through development standards. According to the City, its current practice is to require a rezone to planned development zoning if a project wants to exceed 40 du/acre. This practice, however, does not appear to be uniform or of long-term standing as the City's housing element available-land inventory identifies sites zoned for R-3 that have allowed 60 du/acre. (General Plan, Housing Element, p. 81.) HCD questions whether the City's current practice is consistent with the Housing Accountability Act but need not opine on the matter as we note that Density Bonus Law mandates applicable here remove any potential inconsistencies or difficulties in this instance.

By requesting development standard waivers or reductions under Density Bonus Law to remove the one unit/1000 ft requirement and height limits, the project unlocks any impediments to the full allowable density for the site under the applicable designation and zone. As stated above, the definition of a "density bonus" includes any waivers or concessions needed to achieve the densities allowable under Density Bonus Law. Here, the applicant seeks a waiver of the standards that would impede its proposal. Therefore, to determine what the maximum allowable density would be for the development, the General Plan prevails.

The General Plan designates the site as High Density Residential, which allows up to 80 du/acre. (General Plan, p. 3-16, Policy LU3.3(d)). The City, however, considers that General Plan Policy LU1.2 modifies this designation. While HCD agrees that the policy appears to modify the designation, HCD does not find Policy LU1.2 to be objective within the meaning of the Act. Policy LU1.2 provides "guidelines" as a "starting point" to determine the allowable density on a site. (General Plan, p. 3-13). Specifically, it states the "high-end of the range" is achievable when a site has a planned development zoning designation and "excellence of design" in accordance with prevailing residential density of adjacent developed areas. The term "high-end of the range" and "excellence of design" are not defined in the General Plan and would require subjective judgement to make those determinations. Furthermore, the overall tone of the policy—it is a "starting point" and a "guideline"—is subjective. These words are not consistent with a mandatory "objective" policy. The policy is flexible and subjective. This interpretation appears to be consistent with overall City practice. (General Plan, Housing Element, p. 81 (available land inventory)). Thus, the decision to even apply this tool appears to be discretionary and subjective. Therefore, there is no objective requirement for the development to be rezoned using planned development designation.

Density Bonus Law

Under Density Bonus Law, a housing development that includes certain percentages of affordable units is entitled to certain preferences and benefits under land-use law. Specifically, a local government must, if requested, grant an increase in the allowable units to the development in excess of what would otherwise be allowed under the local government's zoning and general plan. Moreover, the local government must grant

incentives or concessions to reduce costs associated with the development and waivers or reductions of development standards so that the project can achieve the maximum densities allowed under Density Bonus Law. (Gov. Code, § 65915, subd. (b)(1)).

Because the project provides 5 percent of its units affordable to very low-income households, it qualifies for a density bonus of up to a 20 percent bonus above the maximum allowable residential density, one concession or incentive, and waivers or reductions of development standards so that the project can achieve the maximum residential densities allowed under Density Bonus Law. Therefore, the development would be allowed to achieve the densities allowed in the general plan for that site and any waiver or reductions of development standards to the development requirements in the R-3 zone to achieve those densities without having to rezone to a planned development zone.

HCD appreciates the City's consideration of this guidance and welcomes any further opportunities to provide assistance. HCD offers one further note: when conducting research to respond to this request for technical assistance request, HCD noticed that Millbrae's Density Bonus Ordinance (Millbrae Municipal Code, § 10.05.0430) is out of date and out of compliance with recent amendments to state law. (See footnote 1 above.) The City of Millbrae should update its ordinance to be consistent with State Density Bonus Law as soon as possible. Please feel free to contact Melinda Coy, of our staff, at (916) 263-7425 with any questions.

Sincerely,

Shannan West
Land Use and Planning Manager