

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

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February 19, 2025

Mike Rivera
Planning and Building Department
City of Oakland
250 Frank H. Ogawa Plaza
Oakland, CA 94612

Dear Mike Rivera:

**RE: City of Oakland – Market Street and 3701 Martin Luther King Jr Way – Letter
of Technical Assistance**

The California Department of Housing and Community Development (HCD) received requests for technical assistance from the applicant of the proposed project located at 3701 Martin Luther King Jr Way (MLK Project) and from the City of Oakland (City) staff regarding the proposed project on Market Street (Market Street Project). The MLK Project and Market Street Project are utilizing Government Code sections 65852.28 and 66499.41 to create housing. Given the similar requests for assistance on each project, HCD has opted to provide broad guidance to address both inquiries.

Background

Senate Bill 684 (Chapter 783, Statutes of 2023) added Government Code sections 65852.28 and 66499.41, which create a streamlined ministerial approval process for development projects of ten or fewer residential units on urban lots under five acres located on sites that allow for multi-family residential uses. The statutes require the local agency to ministerially consider, without discretionary review or hearings, a parcel map and housing development project that meet specific requirements.

MLK Project

HCD understands the MLK Project proposes to construct seven units on a 6,034 square-foot site. The parcel has a General Plan land use designation of Urban Residential and is in a Neighborhood Commercial (CN-3) zone, which allows for multi-family residential uses. The City has indicated it will require a conditional use permit (CUP) for the proposal, as typically required for residential developments in the CN-3 zone that do not include commercial development within 30 feet of the street frontage. The City is also requiring 75 square feet of open space per unit, consistent with CN-3 zoning regulations.

Market Street Project

HCD understands the Market Street Project proposes to construct four units on a 4,987 square-foot site. The parcel has a General Plan land use designation of Mixed Housing Type Residential and is in a Mixed Housing (RM-2) zone, which allows for multi-family residential uses. City staff has indicated no discretionary approvals are required. However, the project does not meet the 15-foot front yard setback, and staff requested assistance in whether the requirement is still permitted under Government Code sections 65852.28 and 66499.41.

Analysis

Between the two inquiries submitted to HCD, the relevant questions are as follows:

Is the City allowed to require a CUP for a project eligible under Government Code sections 65852.28 and 66499.41?

The answer is “no.” A CUP shall not be required under any circumstance for a parcel map or a tentative and final map for a housing development project qualifying under Government Code sections 65852.28 and 66499.41. Rather, eligible projects are considered ministerial and shall not require a discretionary permit or hearing.¹

Is the City allowed to impose objective standards (e.g., open space requirements, front yard setbacks, etc.) if the project meets all requirements under Government Code sections 65852.28 and 66499.41?

The City may not impose any objective standard that, among other things, physically precludes the development of a project built to the allowed densities as specified in Government Code section 65583.2, subdivision (c)(3)(B), i.e., “default densities.”² The MLK Project and Market Street Project are both within the default densities. Both projects provide the number of units required by the maximum allowable density of the site (prior to any subdivision) established by City zoning regulations,³ and the applicants assert the projects meet the requirements of Government Code section 66499.41, subdivision (a), including lot sizes of at least 600 square feet and average unit size no larger than 1,750 square feet.

¹ Gov. Code, §§ 65852.28, subd. (c)(1); 66499.41, subd. (a).

² Gov. Code, § 65852.28, subd. (b)(2)(A).

³ Government Code section 66499.41, subdivision (a)(5)(B) states that if the parcel is not identified in the City’s housing element, the development will result in at least as many units as the maximum allowable residential density of the original site. The MLK Project and Market Street Project are not located on Housing Element sites.

Therefore, the City is obligated to reduce the front yard setback and open space requirements to the extent necessary to accommodate the units at the proposed density and size. In addition, the City may not impose standards found in Government Code section 65852.28, subdivision (b)(2)(B)-(G). The City may only disapprove a housing development project qualifying under Government Code section 65852.28 if it makes a written finding, based on a preponderance of the evidence, that the proposed project would have a specific, adverse impact on public health and safety and there is no feasible method to mitigate or avoid the impact.⁴

Conclusion

The City may not require a CUP for any project qualifying under Government Code sections 65852.28 and 66499.41. Additionally, the City may not impose on a qualifying housing development any objective standard specifically stated in Government Code section 65852.28, subdivision (b)(2). This includes any objective standard that physically precludes the development of a project built to the allowable density that also meets the lot size and unit size requirements under Government Code section 66499.41, subdivision (a). The City should allow for a reduction in the front yard setback for the Market Street Project and the open space requirement for the MLK Project in a manner that allows for the proposed unit count and size (i.e., 1,750 average square feet of floor area per unit).

If you have any questions regarding the content of this letter or would like additional technical assistance, please contact Bentley Regehr at bentley.regehr@hcd.ca.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Shannan West". The signature is fluid and cursive, with the first name "Shannan" and last name "West" clearly distinguishable.

Shannan West
Housing Accountability Unit Chief

⁴ As defined in Gov. Code, § 65852.28, subd. (d).