DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT
2020 W. El Camino Avenue, Suite 500
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January 9, 2023

Planning Commissioners Alan Linch, Jon Yolles, Ernest Cirangle,
Greg Hildbrande, and Eric Macris
City of Mill Valley
Planning Commission
26 Corte Madera Avenue
Mill Valley, CA 94941

Dear Planning Commissioners Alan Linch, Jon Yolles, Ernest Cirangle, Greg Hildbrande, and Eric Macris:

RE: Blithedale Terrace Mixed-Use Project – Notice of Potential Violation

The California Department of Housing and Community Development (HCD) understands that on January 10, 2023, the Planning Commission of the City of Mill Valley (City) will continue the public hearing to consider a proposed 25-unit mixed-use project to be located at 575 East Blithedale Avenue (APN: 030-021-47) (Project). The purpose of this letter is to express HCD's support of the Project and to provide notice to the City that denying the Project may result in the violation of one or more of the state housing laws described in this letter.

This letter incorporates by reference the contents of HCD's previous Letter of Support and Technical Assistance, dated November 2, 2022 (attached). It largely avoids restating the guidance provided in the previous letter but, for convenience, does reproduce the content related to the statutorily required findings of denial.

After reviewing the deliberations on November 17, 2022, the date of the initial public hearing, HCD notes that the focus of the discussion was on items largely unrelated to compliance with the State Density Bonus Law (SDBL) and the Housing Accountability Act (HAA). Rather, the discussions focused on topics such as reconfiguring vehicular access to the site, reducing unit sizes, and the adequacy of a CEQA exemption. While there is nothing wrong with discussing topics such as these, HCD strongly recommends that the Planning Commission focus its efforts on complying with state housing law. As described in HCD's previous letter, the two most relevant concerns regarding the City's consideration of the proposed project are (1) the objectivity of the development standards applied and (2) findings of denial.

State Density Bonus Law (SDBL)

A project that meets the eligibility requirements of the SDBL is entitled to a density bonus, incentives/concessions, development standard waivers, and limited parking ratios (Gov. Code, § 65915, subd. (b)). The City must grant (i.e., "shall approve") the specific incentives/concessions requested by the applicant unless the City makes written findings, based on substantial evidence, that the incentive/concession would (1) not result in a cost reduction, (2) have a specific adverse impact on health or safety (as defined), or (3) be contrary to state or federal law (Gov. Code, § 65915, subd. (d)). The City bears the burden of proof for the denial of a requested incentive/concession (Gov. Code, § 65915, subd. (d)(4)). The City is also strictly limited in denying requested development standard waivers, preventing it from applying any development standard that would physically preclude a project as proposed unless doing so would have a specific adverse impact on health or safety (as defined) which could not be mitigated (Gov. Code, § 65915, subd. (e)).

HCD reminds the City that appellate courts have established (and continue to affirm) that local agencies cannot lawfully redesign a qualifying SDBL project on the theory that if the project were configured differently, it would not need the requested incentives/ concessions and waivers. (*Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1346-47.) The City must consider the project as proposed, inclusive of any requested concessions and waivers. In the context of a recent SDBL case in San Diego, the appellate court provides an informative summary: "If the City had denied the requested incentives or failed to waive any inconsistent design standards, it would have physically precluded construction of the Project, including the affordable units, and defeated the Density Bonus Law's goal of increasing affordable housing." (*Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App 5th 755, 774.)

Housing Accountability Act (HAA)

The Project meets the definition of a "housing development project" under the HAA (Gov. Code, § 65589.5, subd. (h)(2)). A "housing development project" that meets all objective standards (except those lawfully modified via SDBL concessions and waivers) may only be denied or approved at a lower density if the City makes written findings, supported by a preponderance of evidence on the record, that (1) a specific, adverse impact upon the public health or safety would result and (2) mitigation of the adverse impact is not possible (Gov. Code, § 65589.5, subd. (j)). The HAA also contains language pertaining to legal procedures and penalties.

Conclusion

The State of California is in a housing crisis, and the provision of housing is a priority of the highest order. HCD encourages the Planning Commission to approve the Project as proposed. The Planning Commission should remain mindful of the City's obligations under the SDBL and HAA as it considers the Project. HCD would also like to remind the City that HCD has enforcement authority over the SDBL and HAA, among other state housing laws. Accordingly, HCD may review local government actions and inactions to determine consistency with these laws. If HCD finds that a city's actions do not comply with state law, HCD may notify the California Office of the Attorney General that the local government is in violation of state law (Gov. Code, § 65585, subd. (j)).

If you have any questions regarding the content of this letter or would like additional technical assistance, please contact Brian Heaton at brian.heaton@hcd.ca.gov.

Sincerely,

David Zisser
Assistant Deputy Director
Local Government Relations and Accountability

cc: Patrick Kelly, Director of Planning & Building

Enclosure: HCD Letter of Support and Technical Assistance, dated November 2, 2022

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
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November 2, 2022

Alan Linch, Jon Yolles, Ernest Cirangle.
Greg Hildbrande, and Eric Macris
City of Mill Valley
Planning Commission
26 Corte Madera Avenue
Mill Valley, CA 94941

Dear Planning Commissioners:
Alan Linch, Jon Yolles, Ernest Cirangle. Greg Hildbrande, and Eric Macris

RE: Blithedale Terrace Mixed-Use Project – Letter of Support and Technical Assistance

The California Department of Housing and Community Development (HCD) understands that the Planning Commission of the City of Mill Valley (City) will soon hold a public hearing to consider a proposed 25-unit mixed-use project to be located at 575 East Blithedale Avenue (APN: 030-021-47) (Project). The purpose of this letter is to express HCD's support of the Project and to provide notice to the City that denying the Project may result in the violation of one or more of the state housing laws described in this letter.

HCD understands the Project proposes 25 units, including 19 market-rate units, 3 units affordable to moderate-income (MI) households, and 3 units affordable to low-income (LI) households. By providing at least 10 percent LI units[1], the Project is entitled to one concession[2] and a potentially unlimited number of development standard waivers via the State Density Bonus Law (SDBL) (Gov. Code, § 65915). The Project developer has not requested bonus units.

State Density Bonus Law (SDBL)

A project that meets the eligibility requirements of the SDBL is entitled to a density bonus, incentives/concessions, development standard waivers, and limited parking ratios (Gov. Code, § 65915, subd. (b)). The City must grant (i.e., "shall approve") the specific incentives/concessions requested by the applicant unless the City makes

[1] Three LI units/twenty-five total units = twelve percent LI units.
[2] Concession to increase the maximum allowable building height

written findings, based on substantial evidence, that the incentive/concession would (1) not result in a cost reduction, (2) have a specific adverse impact on health or safety (as defined), or (3) be contrary to state or federal law (Gov. Code, § 65915, subd. (d)). The City is also strictly limited in denying requested development standard waivers, preventing it from applying any development standard that would physically preclude a project as proposed unless doing so would have a specific adverse impact on health or safety (as defined) which could not be mitigated (Gov. Code, § 65915, subd. (e)). The City bears the burden of proof for the denial of a requested incentive/concession (Gov. Code, § 65915, subd. (d)(4)).

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The HAA makes a critical distinction between objective and non-objective standards (i.e., subjective standards). It requires that all objective standards be met for a project to enjoy the benefits and protections of the HAA. When a local agency attempts to apply its full range of applicable standards to a project it must first separate the objective standards from the subjective standards. The former will be given their full regulatory effect and the latter will be reduced to an advisory role. To aid in this process of categorization, the HAA provides a definition of “objective.” “Objective” means, “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)).

After reviewing correspondence between the applicant and the City[3], it appears that there are lingering misunderstandings regarding the objectivity of various local standards. The following are three selected examples for which HCD offers an interpretation to assist the City in its consideration of the Project. The examples listed below are not intended to be exhaustive.

Mixed-Use Definition
The Mill Valley Municipal Code (MVMC) defines a "Mixed-Use Building" as, "any building containing one or more dwelling units, together with commercial and/or business and professional office use." It then further defines the term "Mixed-Use" as, "a property on which various uses such as office, commercial, institutional, and residential are combined in a single building or on a single site in an integrated development project with significant functional interrelationships and a coherent physical design." (MVMC 20.08.070(C))

The first portion of the definition meets the statutory definition of "objective." Whether the project contains one or more dwelling units and a commercial and/or business and professional office use is "uniformly verifiable by reference to an external and uniform benchmark," namely the definition provided in the MVMC. From this point forward, however, the definition veers into subjectivity. Specifically, the terms "integrated development," "significant functional interrelationships," and "coherent physical design" fail to meet the statutory definition of "objective." These terms call for "personal or subjective judgment," and are not "uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the developer applicant or proponent" (Gov. Code, § 65589.5, subd. (h)(8)). These standards, instead, "require personal interpretation or subjective judgment that may vary from one situation to the next." (*Cal. Renters Legal Advocacy & Education Fund v. San Mateo (San Mateo)* (2021) 68 Cal.App.5th 820, 840.) The HAA includes a "reasonable person" standard to be used for the purposes of determining whether a project conforms to standards. (Gov. Code, § 65589.5, subd. (f)(4)).

Upper Story Stepback
The City's Multi-Family Residential and Mixed-Use Design Guidelines and Development Standards instruct applicants to "Design building heights and upper story step backs to reduce impact on neighboring properties and the public right-of-way and allow access to sun light and natural ventilation."[4] This guideline does not meet the statutory definition of "objective" and as such cannot serve to (1) require an upper story step back or (2) establish the distance of upper story step back. This guideline is not objective because it is not uniformly verifiable by reference to an external and uniform benchmark or criterion available and knowable by both the development applicant or proponent and

[3] Letter dated June 14, 2022 from City to applicant and letter dated September 29, 2022 from applicant to City.
[4] Site Planning and Design - Standard #1.A.4 (p. 53).

the public official (Gov. Code § 65589.5, subd. (h)(8). The subjectivity of an upper story step back requirement in the City of San Mateo was the topic of a recent appellate court decision. (See *San Mateo, supra,* 68 Cal.App.5th at 841.) The court opinion explores this issue in detail.

Front Yard Setback.
The City of Mill Valley Multi-Family Residential and Mixed-Use Design Guidelines and Development Standards provide that, "The design of multi-family and mixed-use developments shall be compatible with the natural and built character of the surrounding neighborhood…", and that "…projects should understand how the design fits into the neighborhood context, considering the massing, siting, landscaping, and orientation of buildings. New project designs should complement surrounding residential and mixed-use areas."[5]

This guideline does not meet the statutory definition of "objective" and as such cannot serve to require physical changes to the Project as proposed. The term "compatible" is problematic because it can be interpreted in a multitude of ways. This guideline is not objective because it is not 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)). Further, the call for applicants to consider the "neighborhood context" when making specific design choices regarding the "massing, siting, landscaping, and orientation of buildings" is equally unactionable for the same reason.

Concerningly, in a letter sent from the City to the applicant on June 14, 2022, the City indicates that to comply with this guideline the Project must increase the front setback from 15 feet to 30 feet despite the zone district maximum front yard setback standard of 15 feet.[6] Requiring such a modification to the Project would therefore not only likely represent a violation of the HAA but also contradict the City's own regulatory framework.

Housing Element Site Inventory

A review of the City's Draft Housing Element received August 23, 2022, shows the Project site listed on Table 3.3 (Anticipated Units: Residential Projects with Building Permits Issued after June 30, 2022, or Planning Entitlements) and in Table A (Housing Element Sites Inventory). The entry in the Site Inventory describes the site as being able to accommodate residential densities between 17 and 29 dwelling units per acre (du/ac). At 25 units, the proposed Project would achieve a density of 21 du/ac, which is less than the maximum allowable residential density of the site. The presence of this

[5] Site Planning and Design - Standard #1.A (p. 53).
[6] Table 20.48 (Mixed-Use Residential Development Standards in Commercial Districts) in the Mill Valley Multi-Family Residential and Mixed-Use Design Guidelines and Development Standards (p. 35).

"pipeline" project in the City's Draft Housing Element, and its consistency with the applicable Zoning District and General Plan Land Use Designation density ranges, suggests that the City is prepared to permit the Project at the density proposed.

Conclusion

The State of California is in a housing crisis, and the provision of housing is a priority of the highest order. HCD encourages the Planning Commission to approve the Project as proposed. The Planning Commission should remain mindful of the City's obligations under the SDBL and HAA as it considers the Project. HCD would also like to remind the City that HCD has enforcement authority over the SDBL and HAA, among other state housing laws. Accordingly, HCD may review local government actions and inactions to determine consistency with these laws. If HCD finds that a city's actions do not comply with state law, HCD may notify the California Office of the Attorney General that the local government is in violation of state law (Gov. Code, § 65585, subd. (j)).

HCD appreciates the challenge of transitioning from highly discretionary review process that relies on a combination of objective standards and subjective guidelines to one that achieves quality projects through the verification of objective standards. The statewide move to objective standards was summarized in a recent appellate case: "In short, the HAA does not wrest control from local governments so much as require them to proceed by way of clear rules adopted in advance, rather than by ad hoc decisions to accept or reject proposed housing." *(San Mateo*, *supra,* 68 Cal.App.5th at 851.)

If you have any questions regarding the content of this letter or would like additional technical assistance, please contact Brian Heaton at brian.heaton@hcd.ca.gov.

Sincerely,

Shannan West
Housing Accountability Unit Chief

cc: Patrick Kelly, Director of Building and Planning