

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

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November 12, 2020

Sofia Mangalam, Planning Manager
City of Foster City
610 Foster City Boulevard
Foster City, CA 94030

Dear Sofia Mangalam:

**RE: Housing Accountability Act and Density Bonus Law application to the
Lantern Cove Project – Letter of Technical Assistance**

The purpose of this letter is for the California Department of Housing and Community Development (HCD) to assist the City of Foster City (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 a residential redevelopment project located at 244 Rock Harbor Lane (Lantern Cove Project or Project). This technical assistance is provided based on HCD's understanding of the proposed project as outlined below.

HCD understands the Lantern Cove Project (Project) would result in 588 apartment units, including 232 existing rental apartment units (64 of which will be replaced as part of the Project). The Project has a proposed density of approximately 35 dwelling units per acre (du/acre), and the Project applicant continues to work with the City to determine the percentage of low-, very low-, or moderate-income or senior housing units that will be included in order to qualify for the concessions and waivers allowed under the State Density Bonus Law. The site has a General Plan designation of Apartment Residential with an allowed density of 20-35 du/acre and is zoned R-3/PD (Medium Density Multiple-Family Residential/Planned Development). While no specific density is called out in the Zoning Ordinance, the maximum allowable density that can be achieved in this zone is 19.89 du/ac due to development standards that require a minimum of 2,190 square feet of lot area per dwelling unit.

HCD restates the City's questions below and offers technical guidance in response to those questions:

Question # 1: To accommodate the proposed 35 du/acre density, can the City require that the project site be rezoned, or does the developer have a right under the HAA to proceed without a rezoning based on the General Plan maximum density range of 20-35 du/acre?

In short, the City cannot require the project site be rezoned. Given the maximum density (19.89 du/acre) that can be achieved in the R-3/PD zone is less than the minimum density identified for the site in the General Plan (20-35 du/acre), the R-3/PD zone is inconsistent with the General Plan within the meaning of the HAA. Because of this inconsistency, the Project would not require rezoning to achieve the General Plan densities. The HAA provides in relevant part:

For the purpose 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. (Gov. Code, § 65589.5, subd. (j)(4).)

The City 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, those 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 Project (35 du/acre) (Gov. Code, § 65589.5, subd. (j)(4)).

Question # 2: What is the "maximum allowable density" for the Project site under State Density Bonus law?

For the proposed Project, the maximum allowable density would be 35 du/acre, the maximum of the Apartment Residential designation in the General Plan. While State Density Bonus Law is ambiguous as to whether the maximum density allowed under the zoning ordinance versus the maximum density allowed under the land use element of the General Plan applies when there is no conflict, the law is clear where such a conflict exists. Where there is such a conflict, as there is for the proposed Project, the General Plan density prevails (Gov. Code, § 65915, subd. (o)(2)).

Question # 3: Do the affordability percentages under State Density Bonus Law (to qualify for density bonus waivers, incentives and/or concessions) apply to the total units (588), the new units (420), or the net new units (356)?

HCD interprets that the affordability percentages would apply to the new units (420). State Density Bonus Law applies to new units being constructed, including any replacement units (Gov. Code, § 65915, subds. (b)(1) and (c)(3)(A)(i)). The State Density Bonus Law describes the "proposed housing development" as "inclusive of the units replaced" when existing housing is proposed to be demolished as part of the construction of the new units (Gov. Code, § 65915, subd. (c)(3)). The proposed Project does not appear to encompass, however, the 168 units that will be retained on the site; these units are not considered new construction and therefore ought not be part of the calculation for affordability requirements.

Question # 4: Assuming the General Plan maximum allowable density of 35 du/acre applies and the project does not require a rezoning, would the Project's deviation from the 2,190 square feet per unit lot area zoning requirement count as one of the Project's limited "concessions," or must the City waive this requirement under Government Code section 65915, subdivision (c)(1), without having it count as one of the limited concessions? How does the City determine whether the project's proposed deviations from the height, unit size, and parking dimension zoning standards are required to be waived by the City or would count as concessions? We understand if these standards physically prevent the project from being built at the permitted density with the requested concessions they must be waived and would not count as one of the limited concessions. We further note that many of these deviations would not be required if the project proposed to redevelop the entire site without retaining any of the existing buildings. With regard to height, the development could provide proposed 588 units while meeting the 3 story height limit (parking on the first level doesn't constitute a story pursuant to Section 17.18.050) if they proposed a podium style, higher density development across the entire 16.8 acres; instead they propose to build new units on a small portion of the property in a six-story building. With regard to unit size, the development could provide the 588 units and meet the unit size minimums if they redeveloped the entire 16.8 acres without retaining any of the existing units. With regard to parking space dimensions, the stacker-style parking stalls would not meet the City's requirements for stall dimensions which could likely be achieved if the entire site was redeveloped.

State Density Bonus Law affords significant inducements to developers to include affordable housing as part of their projects in the form of "concessions or incentives" and "waivers or reductions of development standards." (Gov. Code, § 65915, subs. (d) and (e).) While all are a form of benefit or inducement, the statute distinguishes between "incentives or concessions" and "waivers or reduction of development standards." A concession or incentive is defined as:

- A reduction in site development standards or a modification of zoning code or architectural design requirements, including a reduction in setback or minimum square footage requirements;
- Approval of mixed-use zoning; or
- Other regulatory incentives or concessions which result in identifiable and actual cost reductions. (Gov. Code, § 65915, subd. (k)(1).)

The intent of concessions and incentives is to lower the cost of the construction of housing in order to provide for the affordable housing. The number of required incentives or concessions is based on the percentage of affordable units in the project (Gov. Code, § 65915, subd. (d)(2)).

Unlike incentives and concessions, waivers are unlimited, and their purpose is to remove developments standards that have the effect of physically precluding the construction of the density bonus project. Development standards which have commonly been waived or reduced include setback; lot coverage and open space requirements; and building height limits.

In regard to this Project, assuming it otherwise qualifies for a density bonus, the development standard of 2,190 square feet per unit would preclude the ability for the density bonus project to be constructed at the 35 du/acre density. Because this standard would physically preclude the project at this density, the project would qualify for a *waiver* rather than a *concession* of this standard. Nothing in the statute requires the applicant to strip the site of amenities or existing units in order to demonstrate that it is entitled to a waiver. (See, e.g., *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1347.) Further, State Density Bonus Law applies to the construction of the new units (as referenced in Question #3), and not the retained units. Therefore, HCD asserts that the determination of required waivers ought to be based on the new construction only, and ought not consider the existing units that will be retained. In sum, the applicant may submit a proposal for the waivers or reductions necessary to allow the physical construction of the proposed development project, which is the new units (420).

HCD appreciates the City's consideration of this guidance and welcomes any further opportunities to provide assistance. Please feel free to contact Melinda Coy at Melinda.Coy@hcd.ca.gov with any questions.

Sincerely,

A handwritten signature in black ink that reads "Shannan West". The signature is written in a cursive, flowing style.

Shannan West
Land Use and Planning Unit Chief