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California Department of Housing & Community Development
2020 West El Camino Avenue
Sacramento, CA 95833

RE: Sonoma Developmental Center Project Request for Technical Assistance

To Whom It May Concern:

I write on behalf of the County of Sonoma to provide comments on the request for technical assistance submitted on January 30, 2024, related to a proposed development project on the site known as the Sonoma Developmental Center (SDC) located at 15000 Arnold Drive, Eldridge, California. The request for technical assistance presents four issues related to the preliminary application and a change in project description, the density bonus calculation, the definition of "total units" related to builder's remedy projects, and the application of the County's inclusionary zoning requirements. Without limiting the potential to provide additional comments on each of these issues, the County provides the following comments related to the interplay between the Housing Accountability Act's (HAA) builder's remedy and State Density Bonus Law (SDBL).

Determining Affordability of a Housing Development Project

At issue is whether a project that bases the affordability requirements on a portion of the full housing development (i.e. "base units") will be entitled to protection under the builder's remedy.¹ Under the builder's remedy, a local agency cannot disapprove a housing development project for very low, low-, or moderate-income households on the basis that it is inconsistent with the jurisdiction's zoning ordinance and general plan if the jurisdiction does not have a certified housing element.² "Housing for very low, low-, or moderate-income households" includes a housing development project where "at least 20 percent of the total units shall be sold

¹ Cal. Gov. Code § 65589.5(d)(5).

² *Ibid.*

or rented to lower income households, as defined in Section 50079.5 of the Health and Safety Code.^{3,4}

The HAA does not include a definition of “total units.” The applicant contends that the definition of total units in the HAA should follow the definition in the SDBL.⁵ SDBL authorizes the development of bonus units above the maximum density permitted on the site. The number of bonus units is based on the percentage of affordable units and level of affordability of the proposed base units. The term “total units” is used in the SDBL and expressly defined to equate to the number of base units and exclude any units added by a density bonus.⁶ Under this interpretation, the number of “total units” proposed by the applicant is 620 and so the required number of lower income units is 20% of that (or 124) because it is to be calculated excluding the density bonus units.

This interpretation, however, is unsupported by the canons of statutory construction. Starting with the plain meaning rule, courts are to give statutory language its usual and ordinary meaning. The ordinary meaning of “total” is “all” or “constituting, comprising, or relating to the whole of something.”⁷ Further, the legislature could have defined “total units” to match the SDBL definition or cited to it directly. The HAA includes at least 20 defined terms. The statute also references dozens of other statutes, including the SDBL, but does not define “total units” or reference that definition in the SDBL. The definition of “total units” in the SDBL is well-known and long-standing, and the Legislature’s silence should be interpreted as intent that “total units” in the HAA be defined using its ordinary meaning.⁸ Thus, the most proper interpretation of the statute requires 20% of all units proposed on the project site, which is 930, to be affordable to lower income households to qualify for protections under the builder’s remedy.

Applicability of the SDBL to the Builder’s Remedy

The issues presented raise the additional and more overarching question of whether the SDBL is applicable to builder’s remedy projects in the first instance. As stated above, if a local agency has a noncompliant housing element, housing development projects that satisfy the affordability requirements in the HAA do not need to comply with the jurisdiction’s general plan and zoning ordinance, including density standards. This is why the builder’s remedy is sometimes called a “zoning holiday.” When an eligible project is submitted while the jurisdiction is out of compliance, there is no “base zoning” that applies to the project, and no base density upon which to calculate a density bonus.

³ Cal. Gov. Code § 65589.5(h)(3).

⁴ “Lower income households” includes very low income households and extremely low income households. (Cal. Health & Saf Code §50079.5(b).)

⁵ Cal. Gov. Code §§ 65915-65918.

⁶ Cal. Gov. Code § 65915(o)(8)(A).

⁷ See “Total”, *Merriam-Webster*, available at <https://www.merriam-webster.com/dictionary/total> (January 24, 2024).

⁸ see *City of Port Hueneme v. City of Oxnard* (1959) 52 Cal.2d 385, 395, quoting *People v. Town of Corte Madera* (1950) 97 Cal.App.2d 726, 729 (“Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.”)

Applying SDBL to the builder's remedy does not further the stated legislative intent. The purpose of the SDBL is to be able to reduce or eliminate subsidies for affordable housing by allowing a developer to include more units in a project than would otherwise be allowed by the zoning ordinance.⁹ A project that qualifies for the builder's remedy is already unbound by the density prescribed in the local zoning ordinance. The full number of units (i.e., base units plus bonus units) could have been proposed without reference to or reliance on the SDBL. In fact, the only impact that the provision of density bonus units could have on a builder's remedy project is to reduce the affordability of the project to below that which is mandated by the HAA. While the provision of concessions or waivers in accordance with the SDBL does not pose the same concerns, the application is still uncertain. Builder's remedy projects are already exempt from zoning standards that would render the project infeasible, and any applicable standards, conditions, and policies must be applied to facilitate the proposed density.¹⁰ As such, the County proposes that density bonus units do not apply to builder's remedy projects and seeks guidance on whether and how concessions and waivers under SDBL may be applied.

Sincerely,

Sita Kuteira

Sita Kuteira
Deputy County Counsel

⁹ Cal. Gov. Code § 65915(t).

¹⁰ Cal. Gov. Code § 65589.5(f)(1).

