

June 15, 2022

Via Email

Wendy Lao, Associate Planner
Planning Division, Community Development Department
City of San Mateo
330 West 20th Avenue
San Mateo, CA 94403

Re: 222 E. 4th Avenue, San Mateo – Density Bonus Law Project

Dear Ms. Lao,

This correspondence revises and supplements applicant Lane Partners' March 24, 2021, July 10, 2021, February 8, and April 28, 2022 correspondence to you regarding the application of the state Density Bonus Law to the project. This correspondence is in response to comments and questions from City Staff set forth in its , 2022 incompleteness letter. Except as revised herein, the content of the April 28 letter is unchanged.

Your cover letter states that “there may be additional information requested by the Development Review Board, Planning Commission, or City Council during the review process.” Please note that open-ended information requests cannot serve as a basis to determine that a development application is incomplete. (Gov. Code, § 65943.) Following the submission by applicant, the City must determine the application to be complete.

A. Density Bonus

The project's ten rental residential units will be available to lower income households (80% AMI), thus Lane Partners submits that the project automatically qualifies for a density bonus of up to 80% above the maximum allowable residential density of an FAR of 3.0.¹ However, we recognize that the City requires a waiver to exceed the 3.0 FAR, so the project's increase to a 3.1 FAR is addressed in the development waiver section (D) below.

B. AB 1763 Automatic Height Increase

Because the project will provide 100% of the residential units to lower income households and is located within a half-mile of a major transit stop, AB 1763 mandates that the project receive a building height increase of up to three additional stories or 33 feet.¹ This point was confirmed by Staff in its September 14, 2021 Agenda Report. At this point, the project seeks only a height increase from four to five stories, which is necessary to accommodate the project's affordable units.

¹ Gov. Code § 65915(d)(2)(D).

C. Requested Incentives

Per the amendments to the DBL enacted by AB 1763, the project is entitled up to four incentives.² Under the DBL, the definition of an “incentive” includes, but is not limited to, a reduction in site development standards or a modification of zoning code requirements, or other regulatory incentives proposed by the developer, that result in identifiable and actual cost reductions to provide for affordable housing costs.³

A local agency must grant the incentive request unless it can make a written finding, based on substantial evidence, that: (1) the incentive does not result in identifiable and actual cost reductions to provide for affordable housing costs; (2) the incentive would have a specific, adverse impact on the public health, safety, or physical environment or upon an historical resource; or (3) would be contrary to state or federal law.⁴ We submit that none of those findings can be made in this case.

As we have discussed with Staff, recent case law confirms that an applicant is not required to establish that the requested incentive will result in cost reductions. In *Schreiber v. City of Los Angeles* (2021) 69 Cal.App.5th 549, 555, the court explained that there is a presumption that an incentive will result in cost reductions and that an applicant “is not required to establish that cost reductions will result.” Instead, a city must approve the request *unless* it makes one of the written findings set forth in Section 65915(d)(1). (*Ibid.*) “By requiring the city to grant incentives unless it makes particular findings, the statute places the burden of proof on the city to overcome the presumption that incentives will result in cost reductions.” (*Id.* at 556.) As such, a city is “not required to make an affirmative finding that the incentives would result in cost reductions, or to cite evidence to establish a fact presumed to be true.” (*Id.* at 560.) That said, Lane Partners provides additional information in response to the City’s requests, with the expectation that the City will refrain from seeking information beyond what is legally required.

Therefore, Staff’s claims in Item 6 that applicant must provide further information to demonstrate an “identifiable and actual cost reduction” are not warranted. Applicant has provided more than what is required under the *Schreiber* case, and there is no basis upon which the City can claim that additional information is necessary in order to determine application completeness. If you have not yet reviewed the *Schreiber* case, please do so and consider modifying your policies accordingly.

In light of the City Council’s recent direction to eliminate the concept of a bike lane along B Street, and as requested in Item 6.f of your letter, we are eliminating the second incentive request identified in our April 28 letter, and seek only the incentive immediately below.

² *Ibid.* The project’s eligibility for four incentives is recognized in the September 14, 2021 Agenda Report. In our October 27 correspondence, we requested an incentive regarding the City’s onsite parking requirements. Per the amendments to Government Code section 65915(p)(3) effective January 1, 2021, we request that the City not impose any vehicular parking standards upon the project. As such, an incentive is no longer necessary for relief from a city’s parking standards.

³ Gov. Code § 65915(k).

⁴ Gov. Code § 65915(d)(1).

The **incentive** seeks partial relief from the retail frontage requirements set forth in Zoning Code section 27.38.110. As depicted in the Downtown Area Plan's "Required Retail Frontage Zones" map (Fig. 11), the project site is required to establish retail or similar uses along its South Ellsworth Avenue, East 4th Avenue, and South B Street frontages. Our incentive request is to except the retail requirement along the S. Ellsworth Avenue and S. B Street frontages of the project site. Due to the location of the project's parking garage, office and residential lobbies, bike storage, and trash rooms, the minimum 75% retail frontage requirement along these two frontages cannot be met. This requested modification of the City's Zoning Code requirements would result in actual project cost reductions that would help offset the costs of providing the affordable housing units. It is widely recognized that the economic effects of the Covid-19 pandemic include the devastation of the urban retail sector. Requiring the project to comply with Section 27.38.110 would make the project economically infeasible to construct and operate. Reducing the retail requirement from three frontages to one would yield cost savings to help offset the costs of providing the affordable units. The costs associated with the build out of shell retail space would greatly exceed the cost of providing grade level parking stalls for the project. Although not related to the cost saving issue, it is worth considering that removal of some or all of the grade level parking will impair customer access to Draeger's. We will maintain pedestrian-friendly ground floor frontages along S. Ellsworth Avenue and B Street. (The project design contemplates typical retail and a transparent office lobby along S. Ellsworth and typical retail and the affordable residential lobby along B Street.) Please note that the project will provide retail frontages of 47% along South B Street and 47% along South Ellsworth Avenue.

While we believe that the request above is better suited as an incentive rather than a development standard waiver, Lane Partners reserves the right to change the incentive request into a waiver request in response to further comments from the City. Zoning Code section 27.38.110 regarding retail frontage constitutes a development standard to which Section 65915(e) of the DBL may be applied. Development standard waivers are discussed in the section immediately below.

D. Requested Development Standard Waivers

Regarding development standard waivers, they are unlimited, and AB 1763's partial limitation on waivers is restricted to situations involving the use of waivers from maximum density controls, which is not applicable here.

As with incentives, recent case law has clarified the legal principles regarding waivers. The *Schreiber* case confirms that a city may refuse a request to waive or reduce development standards *only* if it makes written findings that the waiver or reduction would have a specific adverse impact on the public health or safety. (*Id.* at 556; Gov. Code § 65915(e)(1).) In addition, another new case upholding a city's approval of a density bonus project confirmed that waivers are based on the project as proposed by the developer: "even if we assume the Project as designed is inconsistent with some of the City's design standards, the Density Bonus Law would preclude the City from applying those standards to deny this project." (*Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755, 775.) Therefore, a local agency may not respond to a

waiver request that a project could be redesigned to avoid the need for a waiver. (*Id.* at 774-775 [rejecting argument that the project “could have been built more horizontally” to comply with design standards.”].)

Also, please note that Staff’s request that the applicant articulate a connection between the waiver and the project’s proposed density is not a DBL requirement. The DBL provision regarding waivers provides: “an applicant may submit to a city, county, or city and county a proposal for the waiver or reduction of development standards that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted under this section,” (Gov. Code, § 65915(e)(1).) Thus, what some cities refer to as the “bonus project” may seek waivers or reductions of local development standards that are in conflict with that project. In this case, the project’s dimensions are clear, and the City’s development standards that would otherwise preclude the development of the project as proposed are set forth below. There is no requirement in the statute or the case law that an applicant provide the granularity requested in your letter. As with incentives, and in the spirit of cooperation with the City, Lane Partners has provided the City with information in response to Staff’s request for a greater showing of connectivity.

Despite applicant’s provision of additional information, Item 6.c of your letter claims that further information is necessary to qualify for the requested waivers. Please note that, for the reasons set forth above, there is no justification to demand further information. As explained in *Bankers Hill*, “a city must offer a waiver or reduction of development standards that would have the effect of physically precluding the construction of a development at the density, or with the requested incentives, permitted by the Density Bonus Law.” (74 Cal.App.5th at 770.) We have made a *prima facie* showing of same. In addition, “unless one of the statutory exceptions applies, so long as a proposed housing development project meets the criteria of the Density Bonus Law by including the necessary affordable units, a city may not apply any development standard that would physically preclude construction of that project as designed, even if the building includes ‘amenities’ beyond the bare minimum of building components.” (*Id.* at 775.) Again, the project meets the threshold affordability requirement under the DBL, thus the City cannot apply any development standards that would preclude construction of the project. In other words, even if Lane Partners did not affirmatively request *any* waivers,⁵ the City is prohibited from imposing any development standards that would physically preclude construction of the project (unless the City makes a finding that the waiver would have a specific, adverse impact on the public health or safety). (Gov. Code, § 65915(e)(1).)

The project’s development standard waivers that are identified at this point of the entitlement process are as follows:

- City Code section 27.38.080 limits structures in the CBD zoning district to the maximum bulk limits in Chapter 27.40. In order to accommodate the new

⁵ If an applicant requests a waiver, however, and it the local agency wrongfully denies it, the court will award attorney’s fees to the applicant. (*Ibid.*)

residential units, the project will exceed the bulk standards set forth in Section 27.40.030, which, if applied, would physically preclude development of the project. Please see **Exhibit A**, attached hereto, which depicts the project's exceedance of the codified maximum bulk limits.

- City Code section 27.38.100(a) requires new developments to be built to the property line to a minimum height of 26 feet, up to the maximum height as permitted in the street wall area or to the maximum height permitted for parcels outside the street wall area, except where a setback is required to meet ground floor open space requirements or where a setback buffer is required adjacent to a residential district pursuant to the Building Height and Bulk Plan in the Downtown Plan. Should Staff determine that this development standard applies to the project's street wall areas, the project cannot meet this standard because the building must be set back from the property line in order to provide the sidewalk widths required by the City's Pedestrian Master Plan. Therefore, application of this standard would therefore physically preclude development of the project. Please see **Exhibit B**, attached hereto.
- City Code section 27.38.100(b) requires at least 75% of a project's building line to be built to the property line. The project will not meet this requirement along its Ellsworth frontage (70% of the building line is built to the property line) as the project is designed to provide a large public plaza in this area which is designed to engage the community and activate the pedestrian realm. Without the requested waiver, this development standard would physically preclude development of the project. Please see **Exhibit C**, attached hereto. When considering this waiver request please note the following from the *Bankers Hill* case (at p. 775): "nothing in the Density Bonus Law 'requires the applicant to strip the project of amenities, such as an interior courtyard, that would require a waiver of development standards. Standards may be waived that physically preclude construction of a housing development meeting the requirements for a density bonus, period.'"
- Sidewalk width requirements on B Street and 5th Avenue are required to meet sidewalk type A10 in Appendix A of the Pedestrian Master Plan. The project cannot meet this requirement along the B Street frontage due to the proposed loading zone configuration on B Street, nor can it meet the 8-foot Through Zone requirement along the 5th Avenue frontage. Please see Sheet L-200 of our plan set that illustrates where the project's required streetscape improvements would otherwise conflicts with the A10 standards. As shown in these plans, compliance with either of these development standards would physically preclude construction of the project because the project could not comply with the applicable setback requirements that would reach further into the parcel due to these frontage requirements.
- City Code section 27.71.120 requires street trees to be planted along public street at a spacing not to exceed 30 feet except to allow for utilities, street

furnishings and driveways. The project can only partially meet this requirement along the B Street frontage due to the loading zone configuration on B Street. Please see Sheet L-100 of our plan set. Full compliance with this development standard would physically preclude construction of the project, thus a reduction of this standard is necessary.

- As noted in Section A above, Lane Partners submits the project's FAR increase from 3.0 to 3.1 as a waiver request, per your direction.⁶ It is self-explanatory that without this FAR increase, the project could not be constructed as proposed, thereby meeting the criterion for a waiver request. This FAR increase is necessary to accommodate the project's residential units.

Lane Partners reserves its rights to seek additional waivers or reductions from otherwise applicable development standards that would preclude development of the project that may arise as a result of the entitlement process.

We look forward to working with Staff on our proposed project and should you have any questions or please do not hesitate to contact me.

Regards,



Marcus Gilmour

⁶ The September 14, 2021 Agenda Report also recognizes that the "larger floor area ratio may be permitted as a density bonus waiver as requested by the applicant."

EXHIBIT A

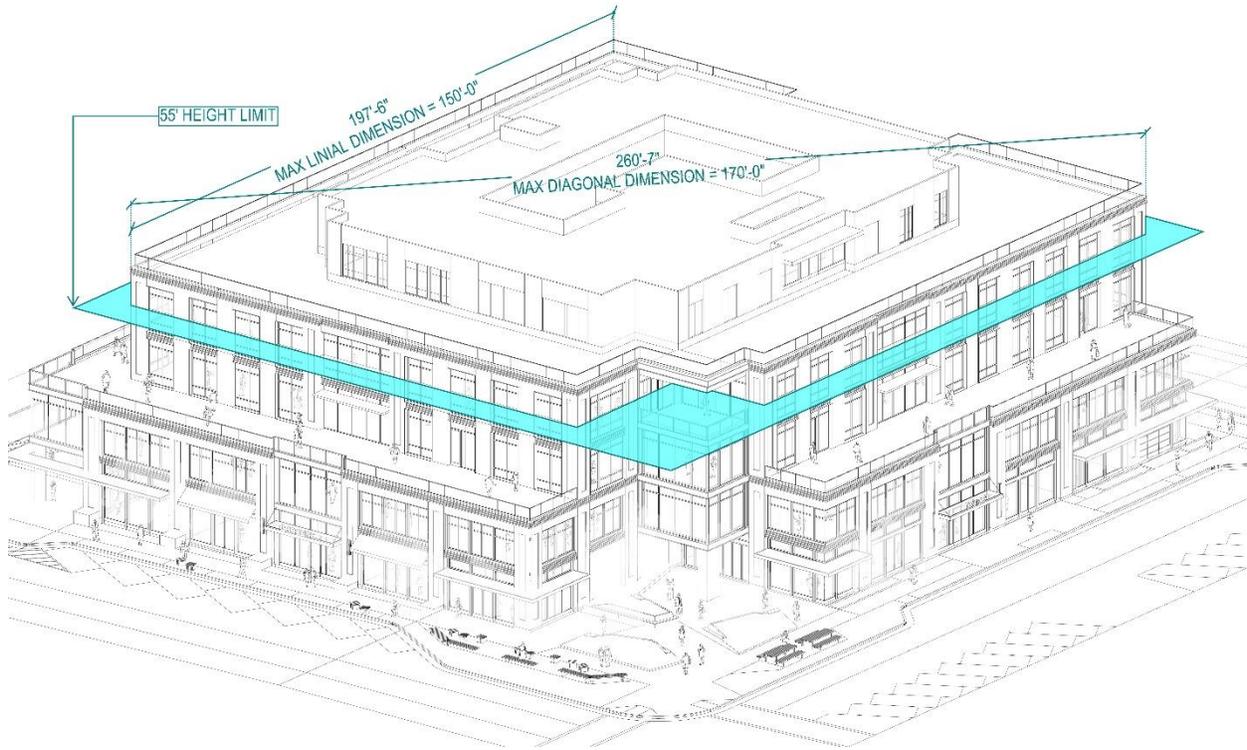


EXHIBIT B

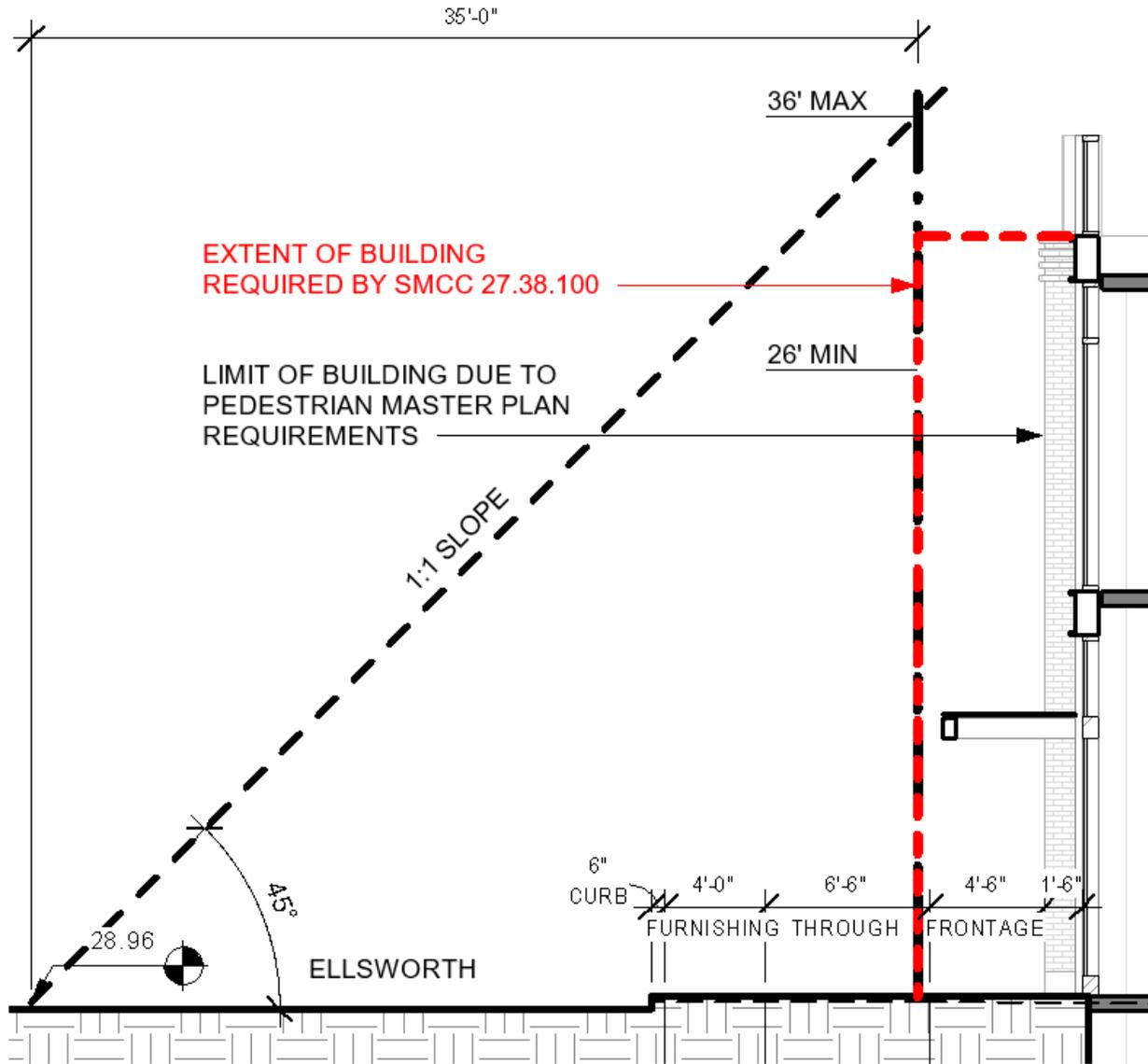
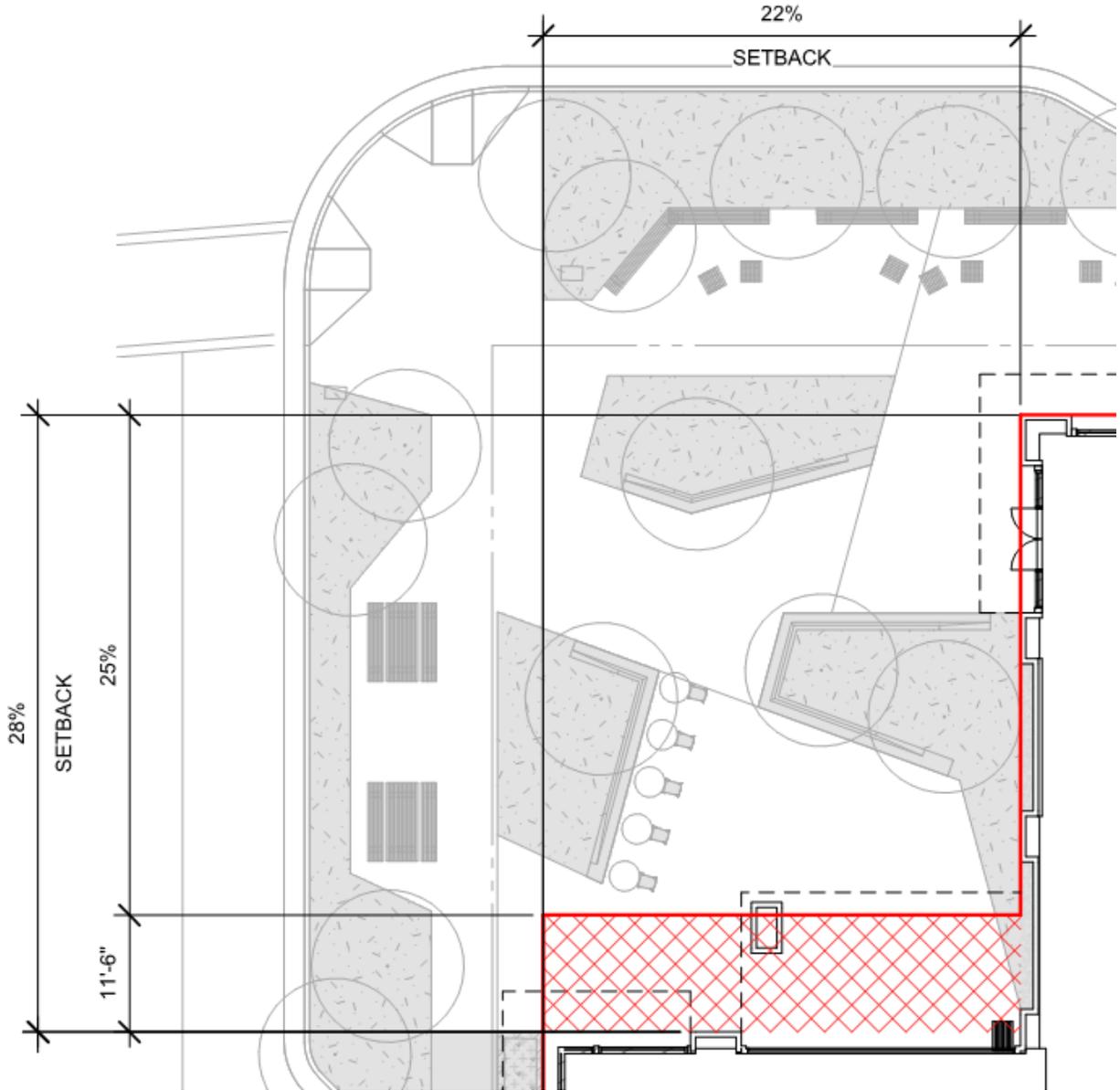


EXHIBIT C



Allen Matkins

Allen Matkins Leck Gamble Mallory & Natsis LLP
Attorneys at Law
Three Embarcadero Center, 12th Floor | San Francisco, CA 94111-4074
Telephone: 415.837.1515 | Facsimile: 415.837.1516
www.allenmatkins.com

David H. Blackwell
E-mail: dblackwell@allenmatkins.com
Direct Dial: 415.273.7463 File Number: 390677.00001/4894-1159-6076.2

Via Electronic Mail

August 1, 2022

Wendy Lao, AICP
Associate Planner
Community Development Department
330 W. 20th Avenue
San Mateo, CA 94403

wlao@cityofsanmateo.org

Re: 222 E. 4th Avenue, San Mateo - Density Bonus Law Project

Dear Ms. Lao:

This correspondence incorporates and supplements applicant Lane Partners' June 15, 2022 correspondence regarding the application of the state Density Bonus Law (Gov. Code § 65915) to the above-referenced project. During my telephone conversation last week with you and Assistant City Attorney Mazarin Vakharia, I agreed to provide additional information that you requested regarding the project's requested incentive and development standard waivers. For brevity, this letter incorporates by reference the contents of the June 15 correspondence on this topic, yet restates certain contents of that letter herein to emphasize certain points.

One of those points already raised in the June 15 letter and reiterated during our conference call, but worthy of repeating here, is that it is important to recognize that although Lane Partners is providing this additional information in the spirit of cooperation and to move this project forward, recent case law makes it quite clear that this information is not necessary for the City to approve the incentive and waiver requests. *Schreiber v. City of Los Angeles* (2021) 69 Cal.App.5th 549, 555, emphasizes that there is a statutory presumption that an incentive will result in actual cost reductions and that an applicant is not required to establish that cost reductions will result. Similarly, a waiver request must be granted if the development standard would otherwise physically preclude development of the project as proposed. As the state Department of Housing and Community Development recently advised another local agency, "the courts have made it very clear that if a project qualifies under [the Density Bonus Law], and if waivers are needed to physically allow that project to go forward with the incentives and concessions granted, the waivers must be granted." (1/20/22 Notice of Violation to City of Encinitas.)

Wendy Lao, AICP
August 1, 2022
Page 2

The second point worth restating is that although we expect that this correspondence will provide the information sought by Staff regarding the project's incentive and waiver requests, should Staff believe that more information is required, this determination should not serve as a basis upon which to determine the project's development application to be incomplete. Amendments to the Density Bonus Law in 2018 to reduce delays in the process of density bonus applications make clear that *after* an application is deemed complete, the local agency must notify the applicant whether the applicant has provided adequate information to the local agency in order to make a determination regarding the requested incentives or waivers. (Gov. Code § 65915(a)(3)(D)(III).)

With these legal principles in mind, Lane Partners provides the following with regard to the project's incentive and waiver requests.

I. INCENTIVE

A. Retail Frontage Requirement

This incentive seeks partial relief from the retail frontage requirements set forth in Zoning Code section 27.38.110. As depicted in the Downtown Area Plan's "Required Retail Frontage Zones" map (Fig. 11), the project site is required to establish retail or similar uses along its South Ellsworth Avenue, East 4th Avenue, and South B Street frontages. Our incentive request is to except the retail requirement along the S. Ellsworth Avenue and S. B Street frontages of the project site. Due to the location of the project's parking garage, office and residential lobbies, bike storage, and trash rooms, the minimum 75% retail frontage requirement along these two frontages cannot be met.¹

This requested modification of the City's Zoning Code requirements would result in actual project cost reductions that would help offset the costs of providing the affordable housing units. The projected costs of providing the project's affordable housing units is approximately \$650,000 per unit. Reducing the retail requirement along S. Ellsworth and B Street would yield approximately \$3.5 million in cost savings, which will contribute to the viability of providing the affordable housing units.

Moreover, the economic effects of the Covid-19 pandemic include the devastation of the urban retail sector. Requiring the project to comply with Section 27.38.110 would make the project economically infeasible to construct and operate, thus an exception from this requirement reduces the losses that would be incurred if full compliance with this Code section was required. This loss reduction inherently helps the economics of the project and thereby results in "identifiable and actual cost reductions" to help address the affordable housing costs.

¹ For this reason, relief from this requirement would also independently qualify as a waiver or reduction of a development standard.

II. DEVELOPMENT STANDARD WAIVERS OR REDUCTIONS

A. Maximum Bulk Limit

As depicted in Exhibit A to the June 15, 2022 correspondence, the project will exceed the maximum bulk standards in Zoning Code section 27.40.030. Above the 55-foot high threshold set forth by this Code section, the project will exceed the maximum linear dimension by 47.5 feet and the maximum diagonal dimension by approximately 90.5 feet. Therefore, requiring compliance with this development standard would physically preclude construction of the project and eliminate the top two floors as proposed.

B. Street Wall

As depicted in Exhibit B to the June 15, 2022 correspondence, the project cannot meet the requirements of Zoning Code section 27.38.100(a), which requires new developments to be built to the property line to a minimum height of 26 feet. The building must be set further back from the property line in order to comply with the City's required sidewalk widths. The difference between the Code's street wall requirement and the proposed project equates to approximately 4.5 feet along the 4th Avenue, Ellsworth Avenue, and B Street frontages. Therefore, compliance with this Zoning Code requirement would physically preclude construction of the project as proposed.

C. Setbacks

As depicted in Exhibit C to the June 15, 2022 correspondence, the project cannot meet the requirements of Zoning Code section 27.38.100(b), which requires at least 75% of the building line to be built to the property line. Along the project's Ellsworth frontage, 70% of the building line will be built to the property line because the project will provide a large public plaza in this area to engage the community and activity the pedestrian realm. Therefore, compliance with this Zoning Code requirement would physically preclude construction of the project as proposed.

D. Sidewalk Widths

The City's Pedestrian Master Plan imposes sidewalk width requirements on B Street and Ellsworth Avenue. In particular, the sidewalk minimum widths for type A10 are 16 feet. The project cannot meet this requirement along the Ellsworth frontage due to the City's requirement that the parking on the opposite side of the street comply with current standards; instead of providing the required 16-foot width, the project can only provide a 15.5-foot width. Along the B Street frontage, the project's loading zone ramps impede compliance with the Pedestrian Master Plan's requirements; although a total of approximately 16 feet in width will be provided, the required Planting Zone and Through Zone dimensions will not be met. The project's conflicts are visually depicted in Sheet L-200 of the project's plan set. Therefore, if the project were required to comply

Wendy Lao, AICP
August 1, 2022
Page 4

with the City's Pedestrian Master Plan's width requirements, the project could not be constructed as proposed.

E. Floor Area Ratio

The project's maximum FAR is 3.0 per Zoning Code section 27.38.060(a). Per Staff's request, Lane Partners requests a waiver of this development standard so that the project can be constructed with an FAR of 3.1. It is self-evident that the project could not be constructed as proposed if its FAR was reduced to 3.0.

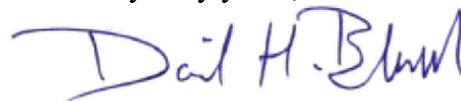
F. Off-Street Loading Zone

Zoning Code Article 2 requires off-street loading facilities of at least 10 feet in width and at least 25 feet in length, with a vertical clearance of at least 14 feet. (Zoning Code, § 27.64.230.) We do not believe that this standard has been imposed on any other recent projects in the City, and it is clear that imposing this requirement on this project would physically preclude construction of the project as proposed. Installing an on-site loading zone with the dimensions necessary to accommodate the large trucks needed for a full service grocery operation would result in the loss of multiple parking stalls, mechanical, electrical and plumbing infrastructure areas, and the loss of the parking garage ramp, which would require a redesign of the project that eliminates critical ground floor office and retail space.

As set forth above, we sincerely hope that this is the final submission required by the City with regard to the project's requested incentive and waivers under the Density Bonus Law. The submissions from Lane Partners exceed what is required under the statute, and addresses Staff's requests for additional information.

We look forward to moving this great project forward through the entitlement process, wherein the parties can continue their discussions and collaboration regarding the project's scope, benefits, and relation to the community.

Very truly yours,



David H. Blackwell

cc: Marcus Gilmour