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To: [Craig Labadie](#)
Cc: [Jeff Bond](#)
Subject: UC's Request for a Waiver or Reduction of Parking Requirements for its Senior Housing Project
Date: Friday, June 08, 2012 1:39:44 PM

Mr. Labadie;

The University of California (UC) has applied for a waiver or reduction of the parking space requirements for its Senior Housing project located at 1030-1130 San Pablo Avenue. The application is based on the State's density bonus laws. Albany's zoning ordinance requires the Planning and Zoning Commission to review applications for density bonuses, and this review was included on the agenda for the Commission's April 24, 2012 meeting, but the item was pulled from the agenda at the request of UC.

I believe that a careful review of UC's application, pertinent State law, and Albany's zoning ordinance will show that: 1) While UC has a right to request a density bonus for its senior housing project, it has chosen not to do so; 2) UC has no right to request an incentive or concession to reduce parking requirements or any development standards; 3) Albany is under no obligation to offer any reductions or waivers of development standards for the UC project; 4) Albany lacks the legal authority to reduce the parking ratio standards below the maximums set forth in statute.

I have summarized my comments on each of these items below:

UC's Right to Request a Density Bonus

California's density bonus laws are set forth in Government Code (GC) Sections 65915-65918. A density bonus is defined as an increase in the maximum allowable residential density over what would otherwise be permitted under a city's regular zoning ordinance. GC Section 65915 (b)(1) requires a city to grant a density bonus when an applicant for a housing development proposes a project that satisfies one or more qualifying conditions. A senior citizen housing development as defined in Sections 51.3 and 51.12 of the Civil Code is a qualifying condition [cf. GC Section 65915 (b)(1) (C)]. The amount of the allowed density bonus is set forth under GC Section 65915 (f) and depends on the conditions under which the project qualifies. For a senior citizen housing development, the maximum density bonus is 20% [cf. GC Section 65915 (f)(3)]. The maximum residential density under Albany's ordinance for the applicable zoning district (San Pablo Commercial) is 63 units/acre. A 20% density bonus could increase this to 76 units/acre. The proposed density of the UC senior housing project is only 27.8 units/acre. Clearly, UC did not seek or require a density bonus for the project.

UC's Right to Request an Incentive or Concession of Development Standards

The applicable statutes clearly distinguish a "density bonus" from an "incentive or concession." This distinction is not always evident in Albany's staff reports and the Council resolution (FN 1). As described above, the requirements for qualification for a density bonus are set forth under GC Section 65915 (b)(1). The requirements for

qualification for an incentive or concession are set forth under GC Sections 65915 (d), (1) and (2). Subsection (d)(1) provides that an applicant that qualifies for a density bonus under GC Section 65915 (b)(1) may submit a proposal for specific incentives or concessions to the city. Subsection (d)(2) describes the number of incentives or concessions the applicant may receive, which is based on the amount of affordable housing provided [cf. GC Sections 65915 (d)(2), (A) - (C)]. UC's proposed development does not provide any affordable housing. Accordingly, the number of incentives or concessions that UC is qualified to receive is zero.

The density bonus provisions of Albany's zoning ordinance closely follow the requirements of State law. Zoning ordinance Section 20.40.040 D.2 describes the number of incentives or concessions that may be provided for various types of eligible projects. Table H-2 under this section shows that a senior housing project does not qualify for any incentives or concessions. This is consistent with State law and again shows that UC has no right to request any incentives or concessions from Albany for its senior housing project. (FN 2).

UC's Right to Request a Waiver or Reduction of Development Standards

In addition to incentives and concessions, State density bonus laws authorize the developer to propose a waiver or reduction of a city's development standards. UC submitted an application for a waiver or reduction of the conditions for approval of its senior housing project [FN 3]. Government Code Section 65915 (e)(1) describes the requirements for such waivers or reductions. It's important to note that the law here was modified in 2008 [FN 4]. The pre-2008 law prohibited a city from applying any development standard that would have the effect of precluding the construction of a development at the densities permitted under the law. The 2008 revisions clarified that a city could not apply standards that had the effect of physically precluding development at the permitted densities. The pre-2008 law authorized the developer to propose a waiver or reduction of development standards, but this was revised in 2008 to again clarify that the standards to be waived or reduced must have the effect of physically precluding the construction of the development at the permitted densities. The original code [GC Section 65915 (f)] required the developer to show that the waiver or modification was necessary to make the housing units economically feasible. This requirement was repealed with the 2008 amendments. The changes here clearly show that the legislature intended that the waiver or reduction of a standard is not to be based on economic feasibility, but rather on physical feasibility. In effect, a city is prevented from providing density bonuses on the one hand and then making these bonus physically unachievable by applying other development standards. As noted previously, the UC Senior project did not request a density bonus and the proposed density is actually less than half the density permitted under the regular zoning ordinance. Accordingly, it is not necessary to even consider whether any Albany development standards that would apply to this project have the effect of physically precluding the construction of housing at the density levels provided by the State density bonus laws. Also, the rather minimal financial data submitted by UC with its waiver request is not relevant.

Section 20.40.040 E. of Albany's zoning ordinance describes procedures whereby an applicant may propose waivers or reductions of development standards. This section

was cited in both the staff report and in UC's request for a waiver or reduction. Albany's ordinance here requires the developer to submit evidence including "relevant financial data" to show that the unmodified development standard has the effect of precluding the construction of a qualified housing development project. This requirement is obviously based on the pre-2008 version of the law. Albany has not revised its ordinance to reflect the recent changes in the State density bonus law and Albany's requirement to consider the financial data and the "economic feasibility" of the project is now in conflict with state law. However, it should also be noted that Albany's current ordinance requires the applicant to "demonstrate that the waiver or reduction is necessary to make the development of affordable housing units economically feasible." (cf. Section 20.40.040 E.2). Also, the subsequent section (Section 20.40.040 E.3.), which defines the City's authority to approve waiver or reduction, again requires that the standard to be waived would "have the effect of precluding the construction of the affordable housing..." Thus, even though Albany's ordinance has not been properly updated to reflect the 2008 changes in State law, it is clear that the specific language of Section 20.40.040 (E) conditions the city's approval of a waiver or reduction on the development of affordable housing. A development that does not provide any affordable housing is clearly not eligible for a waiver or reduction of development standards under Section 20.40.040 E. of Albany's current ordinance.

The procedures for applying for a waiver or reduction of development standards are described in Section 20.40.040 H.5. of Albany's zoning ordinance. Surprisingly, this section was not cited in UC's request for a waiver or reduction of Albany's developmental standards. Section 20.40.040 H.5. provides that where "the applicant can demonstrate, based on verifiable financial information, that any development standard that is applied as a condition of a City action on a housing development project that qualifies for a density bonus would preclude construction of the development project by making the housing units economically infeasible, the applicant may request that the City Council waive or reduce such condition." The language here would appear to provide UC with specific authority to request a reduction or waiver. However, the provisions here that require the submission of "financial information" in order to demonstrate "economic feasibility" are again based on the pre-2008 version of the state density bonus law. As such, these provisions of Albany's ordinance are entirely vestigial. Albany has no statutory authority to consider the impact of its standards on the economic feasibility of the project, only the physical feasibility. UC has not provided evidence to show that any of Albany's development standards would have the effect of physically precluding the construction of the senior housing project at the permitted densities. Accordingly, UC's request for a waiver or reduction of the standards must be denied.

Albany's Authority to Reduce Parking Ratio Standards

The staff report for the April 24, 2012, P&Z Commission meeting item noted that, "the City has adopted 'Density Bonus' regulations in Planning and Zoning Code Section 20.40.040, which gives (*sic*) the City flexibility to modify land use requirements, including residential parking standards, as an incentive for development of senior housing." The claim here overstates Albany's authority and there is less "flexibility" than the report apparently envisions. Regarding parking requirements, zoning

ordinance Section 20.40.040 F. provides that for a project that qualifies for a density bonus, the developer can apply for a reduction in parking requirements to the ratios mandated by Government Code Section 65915 (p) (1) (FN 5). This section of the statutes sets forth the maximum vehicular parking ratios that a City can require for any project that qualifies for a density bonus. For a studio or one bedroom unit, the maximum requirement is one on-site parking space per unit. Unlike incentives or concessions, the parking standards may be requested even if no density bonus is requested.

Albany's parking requirement for new construction is either 2 spaces per unit or 1.5 spaces per unit subject to certain "Special Reduction" findings. Since State law generally takes precedence over local ordinances, Albany would not be permitted to impose its higher parking ratio requirements and the caps set forth in the state law and described in Section 20.40.040 F. of Albany's ordinance would apply.

UC has requested additional reductions in off-street parking ratios below those that may be approved pursuant to Government Code Section 65915 (p) (1). In evaluating UC's request for this additional reduction, it is important to note that Albany's residential parking requirements were established by initiative petition (Measure D) in 1978. State law (California Elections Code Section 9217) states in principal part that, "No ordinance that is...proposed by initiative petition and adopted by the voters, shall be repealed or amended except by a vote of the people, unless provision is otherwise made in the original ordinance." Again, State Density Bonus law establishes the maximum parking ratio requirements that can be imposed on a developer who requests a reduction in parking requirements [i.e., Government Code Section 65915 (p) (1)]. The law also requires a City to adopt ordinances specifying how the provisions of the density bonus law shall be applied [Government Code Section 65915 (a)]. The latter requirement should not be construed as authorizing the City to violate the provisions of State law regarding ordinances passed by a voter initiative.

In fact, state density bonus law specifically prohibits the City from granting a waiver or reduction that would be contrary to state law [Government Code Section 65915 (e) (1)]. Thus, while it is true that State law generally takes precedence over local ordinances, the real impact here would be to lower the parking ratio requirements for qualified projects to those set forth under Government Code Section 65915 (p) (1). In order to reduce the parking requirements further, the City would need to seek approval of the voters in an election contest.

FN 1. Albany's staff reports and resolutions frequently use non-standard, inexact terms to describe the provisions of State Density Bonus law and Albany's zoning ordinance. For example, the April 24, 2012 staff report refers to "an application for Density Bonus to reduce parking requirements" and also a "density bonus application to reduce senior parking to 0.6 spaces per unit." Albany's reports appear to be using the word "bonus" to refer to the incentives and concessions offered in addition to the allowed increase in density. In State law however, the "bonus" is the increase in allowed density. The provisions for incentives and concessions or waivers and reductions are completely different and each is defined separately in State law. This separation is actually clearly evident in Albany's zoning ordinance and is also clearly

described in various reviews of California's Density Bonus Law (e.g., "A Public Agency Guide to California Density Bonus Law" by Barbara E. Kautz and "The Density Bonus Law: Has It's Time Finally Arrived?" by David H. Blackwell). The inexact use of terms in Albany's various documents could confuse the issues here.

FN 2. The staff report for the April 24, 2012 P&Z Commission meeting states that UC has requested a "density bonus application to reduce parkland dedication." In fact, there was no documentation included with the Commission's packet to show that UC actually made this request. If the request was based on UC's authority to request an incentive or concession, it must be concluded that UC has not authority to request a reduction in parkland dedication.

FN 3. UC's Application for a waiver or reduction of the conditions of project approval incorporates some of the same inexact use of terminology evident in the City's documents. Thus, while the application is appropriately titled as an application for a waiver or reduction, the document then describes the request for a concession (e.g., "Concession Request: A concession is requested to reduce the parking standard..."). UC's request for a waiver or reduction also revealed a remarkable level of apparent misunderstanding of both State density bonus law and Albany's ordinance. For example, UC states that, "The proposed project qualifies for a concession or incentive under the Density Bonus Law since it provides housing for senior citizens." In fact, as set forth under Government Code Section 65915 (d)(2), a senior housing project does not qualify for any incentives or concessions. UC also failed to note the special parking ratio standard provisions of Government Code Section 65915 (p) (1). As a consequence, UC's description of the current parking requirements for the senior housing project, i.e., two off-street parking spaces per unit or 1.5 spaces with special findings (cf. Section 20.28 Albany's zoning ordinance) is not accurate. UC also misstates the Albany requirements with its claim that Section 20.40.040 (E) of Albany's ordinance provides that, "The City Council may approve such waiver or reduction upon finding that without such waiver or reduction, the development standard will preclude the construction of affordable housing units or the construction of senior housing units." In fact, Albany's ordinance [Section 20.40.040 (E)(3)] does not mention "senior housing units" and conditions approval solely based on the "construction of the affordable housing units."

FN 4. AB 2280, Runner, Chapter 452, Statutes of 2008.

FN 5. Government Code Section 65915 (p) (1) provides that the developer may request that the city not require a vehicular parking ratio for a qualified project that exceeds the following: one on-site space for zero to one bedrooms; two on-site spaces for two to three bedrooms; and two and one-half on-site onsite spaces for four or more bedrooms. In some cases, these caps could exceed the minimum parking ratios set forth under Albany's Measure D requirements. Presumably, in such cases, the Developer could choose the lower Albany parking requirements.