



PLANNING & DEVELOPMENT SERVICES

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Laurie Berger, Silicon Valley Law Group
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RE: 739 Sutter Avenue Residential Project

Dear Ms. Berger,

Thank you for your letters dated August 30, 2023 and November 1, 2023 regarding the proposed residential project at 739 Sutter Avenue. In response to your first letter, staff met with you and your client directly on September 12, 2023, at City Hall. As indicated in that meeting, and as we will detail further in this letter, the City disagrees with the assertion that a Class 32 categorical exemption does not apply to the proposed residential project at 739 Sutter. Substantial evidence supports the conclusion that this exemption does apply. This letter summarizes your comments, as further detailed in your follow up letter on November 1, 2023, and the City's response to those comments. The most recent project plans and the documentation to support the categorical exemption are available on the project website.

Comment: *The Project requires a full CEQA Evaluation and does not qualify for a Class 32 Categorical Exemption, noting that it would clearly result in impacts related to traffic, noise, and air quality.*

Response: The documented exemption attached, which was made publicly available in October 2023, prior to the ARB study session, provides substantial evidence to support the conclusion that there would be less than significant impacts related to traffic, noise, and air quality, among other criterion listed in the Class 32 exemption requirements. Your comment refers to examples of projects that may be exempt under CEQA Guidelines 15303 (Class 3 exemption), incorrectly applying those to the Class 32 exemption. The documented exemption details how the project complies with criteria set forth in the CEQA Guidelines for a Class 32 exemption.

Comment: *The Project is inconsistent with the Comprehensive Plan and relevant policies, including references in the Comprehensive Plan Housing Element that protect single family residential site development regulations as well as policies L-1.3 and L-1.11 which encourage compatibility of infill development with its surroundings and speaks to high quality development standards.*

Response: The project is a housing development project, as defined in Government Code Section 65589.5 (Housing Accountability Act [HAA]). As a housing development project, only objective Comprehensive Plan policies and standards may be applied to the proposed project in accordance with the HAA. The policies that the commenter references are not objective and therefore were not discussed in the draft findings for approval of the proposed project. Nevertheless, the City disagrees that

the project would be inconsistent with those policies; no substantial evidence has been provided to support the conclusion that the project would be inconsistent with these policies. Further, the proposed project provides multi-family housing in a multi-family zone district. It is not located in a single-family residential zone and does not propose modifications to any development standards for the R-1 zone district.

In accordance with California Government code 65589.5, “the receipt of a density bonus, incentive, concession, waiver, or reduction of development standards pursuant to Section 65915 shall not constitute a valid basis on which to find a proposed housing development project is inconsistent, not in compliance, or not in conformity, with an applicable plan, program, policy, ordinance, standard, requirement, or other similar provision specified in this subdivision.” Therefore, the use of concessions and waivers under density bonus law is not a basis for finding the project inconsistent with the City’s zoning code or Comprehensive plan. Moreover, the courts recently affirmed that a class 32 exemption still applies in cases where waivers and concessions are granted in accordance with state density bonus law (*Wollmer v. City of Berkley* (2011) 193 Cal.App.4th 1329, 1349-50).

Comment: *The commenter states that the project would result in traffic impact and states that the CE concludes that the project would be better located in a transit-oriented neighborhood. The commenter states that utilizing traffic counts at intersections to determine air quality and noise impacts is not appropriate.*

Response: The CE evaluates impacts on the existing environment, including adjacent residential uses, but does not conclude that this project would be better located in a transit-oriented neighborhood. The documentation to support the findings for a Class 32 exemption includes a traffic analysis and concludes that the project would have less than significant impacts related to transportation, including but not limited to, Vehicle Miles Traveled (VMT). The analysis of vehicle trip increases at intersections in the report is provided for the purposes of evaluating long-term noise and air quality impacts from traffic on the existing environment. That analysis also concludes that the project would have a less than significant impact related to these criteria.

Comment: *The commenter states that construction related noise is inadequately addressed and studied in the CE. The commenter also identifies concerns about noise generated from people on roof decks and states that a shade and shadow study is required to evaluate shading impacts.*

Response: The analysis identifies the maximum noise level that could be experienced at any given point in time during construction as measured at the property line. The commenter incorrectly applies the maximum noise level to all construction activities for the entirety of construction. The analysis in the documentation for the Class 32 exemption has been revised for clarity. The commenter states confusion over whether roof decks are provided. Building 2 was revised based on feedback at the preliminary review hearing to remove all roof decks on that building. Following ARB review of the formal application roof decks on Building 1 were also removed. All references to “decks” in the report have been revised to “balconies” for clarity. The analysis for operational noise impacts does not assess noise that could be generated by future residents using their balconies. Not only would this analysis be speculative, but Assembly Bill 1307 specifically indicates that social noise generated by residents is not an impact under CEQA.

The applicant is not required to provide a shade and shadow analysis for the proposed project, nor does the City have any criterion or threshold for significance by which to measure what would constitute a significant impact. The city utilizes development standards, primarily daylight plane and setbacks, to regulate light and air between uses. The project complies with the required daylight plane at the rear of the property and exceeds the required rear setback of 10 feet.

Privacy is not an impact evaluated in accordance with CEQA; however, the project complies with all relevant objective standards related to privacy screening and sight-line requirements to reduce privacy impacts on adjacent residential uses as shown in the project plans provided on the project website.

Comment: *Construction-related Air Quality and Hazardous Materials Impacts. There is no discussion in the CE of the potential for lead, asbestos, or PCBs to be in the demolition materials.*

Response: Air quality impacts related to construction and operation are evaluated in the documentation for the Class 32 exemption. The analysis has been revised to include a summary of regulations that would apply to the project to protect from lead-based paint and asbestos. The project does not meet the threshold for requiring further PCB analysis. In compliance with EPA guidance, further analysis of PCBs prior to demolition is not warranted for wood-framed, residential buildings.

Comment: *The commenter states that inadequate emergency access is provided.*

Response: The project plans have been evaluated by the City's Fire Department and were found to meet the Fire Department standards in compliance with the City's regulations. The fire department provides various options for property owners to meet the relevant fire regulations, taking into account site specific constraints such as the presence of overhead utility lines. In the case of the proposed project, emergency access in the event of a fire would be consistent with existing conditions in that the fire apparatus would park on Sutter Avenue and firefighters would access the site with ground ladders. The project has been specifically designed to provide ground ladder access at both ends of the two buildings. Commercial grade fire sprinklers are also proposed for the buildings. The project is therefore consistent with Policy S-2.13 of the code. Staff notes that the height is nominally taller than that allowed in the RM-20 zone district (33.5 feet for Building 1 and 32 feet at the rear building where 30 feet is allowed) and that the project meets the setbacks and daylight plane requirements adjacent the single-family residential use. Therefore, the project meets the current fire code safety requirements and does not create a greater threat with respect to hazards than the existing conditions. The preparation of an IS/MND to further evaluate this is not warranted.

Comment: *The commenter states that the project utilizes too many waivers and concessions and states opinions regarding why the project was not added as a housing inventory site.*

Response: In accordance with density bonus law, the project is eligible for waiver or reduction of development standards that physically precluding development at the densities permitted by state law as well as concessions as detailed in the November 2, 2023 staff report. There is no limit on the number of waivers that may be sought. In response to comments from the Architectural Review Board and members of public, the applicant has revised their plans to reduce the extent of the waivers being requested without reducing the overall density. As noted previously, use of concessions and waivers

under density bonus law is not a basis for finding the project inconsistent with the City's objective standards in accordance with the Housing Accountability Act.

The commenter opines that this was not listed as a housing site in the 2030 comprehensive plan because of impacts to adjacent residents. However, the site is identified as a pipeline project in the adopted Housing Element. Sites where projects are on file and identified as pipeline projects in the Housing Element are not also identified as Housing Inventory Sites to avoid double counting toward the City's Regional Housing Needs Allocation.

Comments: *Project is subject to the current code requirements.*

Response: As the commenter correctly notes, the current application is not subject to development standards that were in affect at the time the Senate Bill 330 pre-application was submitted because the applicant failed to resubmit plans in accordance with the timelines set forth in SB 330 (180 days for the initial submittal, 90 days for each resubmittal). Therefore, the project is being processed in accordance with the objective standards set forth in the current municipal code.

We appreciate your comments on the proposed project. If you have further questions please do not hesitate to contact me at 650-329-2116 or via email at Claire.raybould@cityofpaloalto.org.

Regards,

Claire Raybould, AICP
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