

**RESOLUTION NO. 2019-13**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF LOS ALTOS  
DENYING AN APPEAL AND AFFIRMING STAFF'S DETERMINATION  
THAT THE PROPOSED PROJECT AT 40 MAIN STREET IS NOT SUBJECT  
TO MINISTERIAL STREAMLINED PERMIT PROCESSING OF A  
DEVELOPMENT APPLICATION PURSUANT TO GOVERNMENT CODE  
SECTION 65913.4 (SB 35)**

**WHEREAS**, On November 8, 2018 project proponents submitted applications, plans and materials (collectively, the "Application") for a project (the "Project"), consisting of a five-story mixed use building with two levels of underground parking, to be accessed by a single-vehicle lift from Public Parking Plaza 10. Uses within the proposed building include office space on the first level and fifteen (15) residential rental units on levels two to five. Two of the fifteen (15) residential rental units are proposed as below market rate (BMR) units; and

**WHEREAS**, the applicant (the "Appellant") applied for a streamlined ministerial permit pursuant to Government Code Section 65913.4, et seq., (SB 35), asserting that the Project is eligible for a density bonus of seven market rate rental units above an assumed base of eight rental units, concessions/incentives, waivers, and application of the parking standards for residential units provided by SB 35; and

**WHEREAS**, SB 35 provides a unique, streamlined ministerial permitting process, which when applicable, limits and expedites a city's review process, including limiting a city's ability to conduct environmental review and scrutinize an application for compliance with other generally applicable requirements, and as a result, the City must ensure such process is applied only in accordance with the legal standards specified in SB 35; and

**WHEREAS**, SB 35 establishes extensive, specific objective criteria and planning standards for projects seeking to qualify for streamlined ministerial permitting under its provisions; and

**WHEREAS**, SB 35 provides that a project applicant may submit an application for streamlined ministerial permitting if it satisfies such objective standards and criteria; and

**WHEREAS**, upon submittal of an application purporting to qualify for SB 35 ministerial streamlined permitting, SB 35 requires a local agency to evaluate any such project application for compliance with such standards and criteria, which shall include an evaluation of whether the project, excluding any additional density or any other concessions, incentives or waivers of development standards granted pursuant to the State Density Bonus Law, Government Code Section 65915, is consistent with objective zoning standards and objective design review standards in effect at the time that the application is submitted to the local agency; and

**WHEREAS**, SB 35 requires within 60 days of application submittal for a project containing 150 or fewer units, that if a local agency determines a project seeking ministerial streamlined permitting is in conflict with any of the objective standards specified in SB 35, the agency shall provide the applicant written documentation of which standard or standards the

development conflicts with, and an explanation of the reason or reasons the development conflicts; and

**WHEREAS**, in accordance with SB 35, Staff thoroughly and timely reviewed the submitted Application (including all plans and Project documents) and determined that the Project does not qualify for streamlined ministerial permit processing provided by SB 35 because, on its face, it is inconsistent with certain objective planning standards, and also because the Application did not contain sufficient information to enable the City to make a meaningful and lawful determination regarding the Project's eligibility for SB 35 streamlined permitting on the application; and

**WHEREAS**, on December 7, 2018, in accordance with SB 35, Staff timely responded in writing to the Application (the "December 7 Letter"), finding that the Project is not eligible for SB 35 because, among other things, it is inconsistent with objective City development standards for access/egress to the proposed off-street underground parking and providing written notification with the accompanying Notice of Incomplete Application, which clearly stated the Application's incompleteness and listed the Application's extensive deficiencies and the additional information necessary to enable the City meaningfully to evaluate the Application; and

**WHEREAS**, in the December 7 Letter, receipt of which was publicly acknowledged by Appellant, City Staff provided written documentation (1) that the Project did not comply with SB 35 because, among other things, it failed to comply with objective City Municipal Code requirements for off-street residential and visitor parking and inadequacies for ingress and egress to same; (2) that the Application was incomplete and failed to provide enough information necessary for the City to determine whether the Project is consistent with all applicable City objective standards as required by SB 35, (3) requesting such further information including, without limitation, information responsive to the "Density Bonus Report Submittal Requirements" checklist included with the December 7 Letter and inviting Appellant to submit the required information to enable the City to process the Application, and (4) notifying the Appellant that two applications had been submitted for the Project site and that one must be withdrawn because the City does not have provisions for concurrent processing of multiple development proposals on the same site; and

**WHEREAS**, the Appellant did not submit the necessary information specified in the December 7 Letter nor request any further clarification from Staff regarding the information needed to enable the City to meaningfully evaluate the Application; instead, by letter dated January 10, 2019 but submitted to the City on January 17, 2019, Appellant's attorney, Daniel R. Golub, of Holland and Knight LLP, asserted that the Project was "deemed to comply with all of SB 35's qualifying criteria as a matter of law" and that the Project was entitled to issuance of a streamlined ministerial permit under SB 35 no later than February 6, 2019; and

**WHEREAS**, on February 6, 2019, the City provided a written response to Appellant, reiterating City's position that the Project does not qualify for SB 35 streamlined ministerial permitting and that the Application (including all plans, and materials submitted), did not contain sufficient information to enable the City to make a meaningful and lawful determination on the Application; and

**WHEREAS**, on February 21, 2019, the Appellant's attorney submitted an appeal of Staff's determination to the City Council; and

**WHEREAS**, in accordance with Los Altos Municipal Code Section 1.12.050, the appeal was scheduled and duly noticed for public hearing at the next available regular meeting of the City Council; and

**WHEREAS**, on April 9, 2019, in accordance with Los Altos Municipal Code Chapter 1.12, the City Council conducted said public hearing, thoroughly evaluated and considered the appeal, together with all information and evidence presented by the Appellant and all other information in the record, including public testimony and information presented by Staff; and

**WHEREAS**, as acknowledged by the Appellant's attorney at the public hearing on the appeal, SB 35 and the Housing Accountability Act authorize and require the City to assess the objective standards applicable to the Project and the Project's consistency with such standards; and

**WHEREAS**, based on such review and the record as a whole, the evidence before this Council does not support granting the appeal; the evidence in the record amply demonstrates the Project is inconsistent with objective planning standards and other SB 35 criteria and otherwise does not qualify for SB 35 or the Housing Accountability Act because, among other things, relies upon a discretionary density bonus that exceeds the 35% density bonus authorized under the State Density Bonus Law, does not comply with objective standards for parking, height, Americans With Disabilities Act and Downtown Design Guidelines, fails to comply with SB 35's requirements for 2/3 residential project square footage, and fails to demonstrate base density necessary to calculate affordability levels and other applicable requirements; and

**WHEREAS**, because the Project does not meet the criteria of SB 35, the City is not legally authorized or required to grant a streamlined ministerial permit under SB 35 and to do so potentially would violate SB 35, the State Density Bonus Law, the California Environmental Quality Act and other applicable legal and regulatory requirements; and

**WHEREAS**, this action is exempt from CEQA pursuant to CEQA Guidelines (14 Cal. Code Regs.), Section 15270, in that CEQA does not apply to projects that a public agency disapproves; and

**NOW THEREFORE, BE IT RESOLVED**, that the City Council of the City of Los Altos hereby denies the appeal and affirms Staff's determination that the proposed Project is not subject to ministerial streamlined permit processing of a development application pursuant to Government Code Section 65913.4 (SB 35). The City is not mandated or authorized to issue streamlined ministerial approval of the Application. This determination is based on the Recitals set forth above together with the following findings and determinations, all of which are based upon the evidence presented in the record as a whole and each of which provides a separate and independent basis for this decision:

1. It is the role of City Staff to assess and evaluate whether projects meet the requirements of SB 35. In duly exercising this State-mandated role, in the December 7 Letter, as confirmed through subsequent correspondence and other evidence in the record, Staff properly determined and timely notified the Appellant that the Application was incomplete and did not contain all the information necessary to enable City Staff to meaningfully or lawfully determine that the Project is eligible for streamlined review under SB 35. As a result, Staff appropriately determined the Project is not subject to SB 35 and identified the information necessary to complete the Application and allow the City to proceed with evaluation of the Application and the Project.

2. The December 7 Letter provided timely, adequate and sufficient notice and written documentation in accordance with SB 35 to advise the Appellant that the Project was inconsistent with objective planning, zoning and design standards and failed to qualify for SB 35. The January 10, 2019 letter from the Appellant's attorney representative identified and referenced City codes and regulations, amply demonstrating the Appellant had received adequate notice and understood and comprehended the Application's deficiencies. The Appellant did not submit the necessary information specified in the December 7 Letter nor request any further clarification from Staff regarding the information needed to enable the City to meaningfully evaluate the Application; instead, by letter dated January 10, 2019 but submitted to the City on January 17, 2019, Appellant's attorney, Daniel R. Golub, of Holland and Knight LLP, asserted that the Project was "deemed to comply with all of SB 35's qualifying criteria as a matter of law" and that the Project was entitled to issuance of a streamlined ministerial permit under SB 35 no later than February 6, 2019. The evidence demonstrates that Appellant had more than sufficient notice and opportunity to seek clarification and to respond to the Application's deficiencies, but Appellant made no attempt to do so.

3. Because the Project relies upon a density bonus that exceeds that authorized under the State Density Bonus Law, the Project is inconsistent with objective City standards. The Project fails to establish a base density to enable the City to determine Project affordability percentages. Nonetheless, the Application asserts a base density of eight (8) units and requests a density bonus of 87.5%, together with additional incentives and waivers. Specifically, the Application requests seven "bonus" market rate units, which results in an 87.5% density bonus increase ( $7/8 = 87.5\%$ ) for a proposed total of 15 units. This request substantially exceeds, and therefore conflicts with, the objective 35% maximum mandatory density bonus provided for under the State Density Bonus Law, Government Code Section 65915. Pursuant to SB 35, the City is required to evaluate an application for consistency with objective zoning and design review standards "excluding any additional density or any other concessions, incentives or waivers of development standards *granted pursuant to [State] Density Bonus Law in [Government Code] Section 65915.*" (Gov. Code § 65913.4(a)(5)(emphasis added). The bonus also exceeds, and therefore is inconsistent with, all mandatory minimum density bonuses specified in the Los Altos Density Bonus Ordinance, Los Altos Municipal Code Section 14.28.040. Although the Los Altos Density Bonus Ordinance provides the City Council with discretion to grant a density bonus higher than the State Law maximum of a 35% bonus, SB 35 does not require, authorize, nor contemplate that such a discretionary bonus can or should be consistent with objective standards for purposes of approving ministerial streamlined permitting. Furthermore, the application mischaracterizes what is really a request for a discretionary 87.5% density bonus,

as a request for mandatory concessions/incentives and/or waivers. A density bonus increase above State Density Bonus Law is not a concession/incentive nor a waiver. The State Density Bonus Law clearly delineates and creates separate and distinct definitions and requirements for density bonuses, concessions/incentives and waivers. Appellant has inappropriately attempted to conflate these concepts by seeking to gain additional density, in excess of that could be granted pursuant to the State Density Bonus Law, through application of concessions/incentives or waivers to gain a larger building. Even if the Appellant could argue the concessions/incentives or waivers provisions of the State Density Bonus Law should be considered “consistent” with objective standards (which it should not), this would not entitle Appellant to the additional *density* the Application seeks.

4. The Application does not provide sufficient information for a reasonable reviewer to determine whether the findings for denial of density bonus concessions or waivers apply, including, without limitation, whether the granting of such concessions or waivers would have a specific adverse impact on public health and safety or the physical environment that could not feasibly be mitigated. Without the information requested in the December 7 Letter’s Notice of Application Incompleteness (Density Bonus Report Submittal Requirements), the City was unable to reasonably or meaningfully assess the concessions and waivers requests. Nonetheless, the requested concessions and waivers appear to raise substantial issues concerning public health and safety, including questions regarding the ability of the Project to satisfy the requirements of the Americans with Disabilities Act, the minimum twelve (12) foot first floor interior height requirements established under the City Municipal Code Section 14.54.120 and access/egress requirements for the Project site.

5. The Project does not comply with the objective standards for parking areas provided for in Los Altos Municipal Code Section 14.74.200 N., which requires that off-street parking areas be in accordance with the minimum standards shown on the drawing labeled “Parking Standards Exhibit A.” There are no provisions in the Parking Standards Exhibit for a vehicle lift system that provides access to subgrade parking levels.

6. The Project does not provide two-thirds (2/3) of the development’s square footage for residential use, which is required for mixed-use projects to qualify for SB 35 (Gov. Code §65913.4(a)(2)(C)). Although the Application lacks sufficient detail to fully evaluate key Project details and thereby enable the City to readily determine whether the two-thirds (2/3) square footage requirement is met, when totaling all five floor levels and the two subgrade parking levels, the total development would comprise approximately 42,276 square feet. To meet SB 35 requirements, the Project would need to provide 28,184 square feet of residential space in order to comprise two-thirds (2/3) the gross Project square footage. Under the Application, however, 23,076 square feet of the gross development building square footage which would be designated for housing. This calculation is based upon the State Housing and Community Development Department (“HCD”) Guidelines, which provide that the two-thirds (2/3) calculation should be based upon the proportion of gross square footage of residential space and related facilities (including residential parking, storage and areas dedicated to residential access) to gross development building square footage for an unrelated use, such as commercial (HCD Guidelines Sections 400(b)(1); 102(u)). In accordance with the HCD Guidelines, “additional density, floor area, or units granted pursuant to Density Bonus Law are excluded from this calculation.” (HCD Guidelines Section 400(b)(1)). As a result, the Project fails to qualify for the SB 35.

7. The Project fails to comply with objective design standards found in the Downtown Design Guidelines. Notably, the Project conflicts with the following standards of the Downtown Design Guidelines:

- a. 3.2.1 b) *Break larger building into smaller components*  
Proposed building is one large multi-story structure that is uniform in its materials, finishes, and trim and has not been divided up to appear as a series of smaller building forms of individual designs and architectural styles.
- b. 3.2.2 b) *Relate the façade designs to adjacent structures*  
The proposed structure does not relate well to adjacent structures and rather than respect their scale, bulk, height, and mass introduces a building that is disruptive to those adjacent structures and presents a façade that is not in harmony with adjacent buildings and the pedestrian nature of this portion of Main Street.
- c. 3.2.7 b) *Avoid architectural styles and monumental building elements that do not relate to the small human scale of Downtown Los Altos*  
At five stories and an overall height of 66'4", the Project does not relate well to the small human scale of Downtown Los Altos.

8. As demonstrated in the record, the Project is inconsistent with City objective height standards. The proposed building height is 56.5 feet to the top of the roof deck, in an area where the City has adopted a 30 foot height limitation. Although the Application contemplates utilization of density bonus waivers and concessions to achieve the proposed height, the Application does not adequately demonstrate it qualifies for such concessions and waivers because, among other things, it does not adequately establish a base density that demonstrates minimum affordable unit percentages are satisfied, nor does it provide sufficient information for the City meaningfully to evaluate whether the requested concessions and waivers must be denied due to specific adverse impacts on public health, safety or the environment or other applicable grounds.

9. A base density for the Project site cannot be reasonably relied upon. The Project plans, which purport to justify a base density of eight (8) residential units, assume utilization of a vehicle lift system that does not comply with the standards of Los Altos Municipal Code Section 14.74.200 N. This Code requires that off-street parking areas be in accordance with the minimum standards shown on the drawing labeled "Parking Standards Exhibit A". There are no provisions in this Parking Standards Exhibit for a vehicle lift system that provides access to subgrade parking levels.

10. By failing to establish a base density, the Application fails to demonstrate that it provides the percentage of affordable housing necessary to qualify for SB 35 or for the requested density bonus, concessions and waivers requested and required for the Project to be consistent with objective development standards or otherwise satisfy the criteria necessary to gain the benefits of SB 35; and be it

**FURTHER RESOLVED** that neither the Housing Accountability Act, Gov. Code Section 65589.5, nor SB 35 authorizes or mandates approval of the Application because (a) the

Housing Accountability Act applies to determinations based upon a complete application, and here, the Application has not been determined or deemed complete; and (b) the Project is inconsistent with objective planning and development standards, as discussed above and demonstrated in the record of proceedings; and be it

**FURTHER RESOLVED** that the Application cannot be processed prior to withdrawal of one of the two applications for development currently pending before the City. Although City has notified Appellant of this requirement, it has not withdrawn either pending application.

**I HEREBY CERTIFY** that the foregoing is a true and correct copy of a Resolution passed and adopted by the City Council of the City of Los Altos at a meeting thereof on the 23<sup>rd</sup> day of April, 2019 by the following vote:

AYES: BRUINS, ENANDER, FLIGOR, LEE ENG, PEPPER  
NOES: NONE  
ABSENT: NONE  
ABSTAIN: NONE

  
Lynette Lee Eng, MAYOR

Attest:

  
Jon Maginot, CMC, CITY CLERK