



OFFICE OF COMMUNITY DEVELOPMENT

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CITY COUNCIL INFORMATIONAL MEMORANDUM

Date: July 25, 2024

To: Cupertino City Council

From: Piu Ghosh, Planning Manager

Luke Connolly, Assistant Director of Community Development

CC: Benjamin Fu, Director of Community Development

Pamela Wu, City Manager

Chris Jensen, City Attorney

Re: Scofield Drive SB330 Preliminary Application pursuant to Builder’s Remedy (“BR”) Provision of the Housing Accountability Act (“HAA”)

Background

At the July 16, 2024 City Council meeting, Councilmembers Chao and Moore requested an informational memorandum regarding the SB330 Preliminary Application submitted for property located at 20739 Scofield Drive. This informational memorandum summarizes the vesting provisions of SB330, the “builder’s remedy” (“BR”) provision of the Housing Accountability Act (“HAA”), the SB330 Preliminary Application submitted by the property owner for 20739 Scofield Drive utilizing the BR provision of the HAA and a summary of other SB330 Preliminary Applications received by the City.

Summary of the “Builder’s Remedy”

The BR provision of the HAA is included in subdivision (d) of the HAA, which requires local agencies to make one of five findings to deny, or to apply conditions that make infeasible, a housing development project “for very low, low- or moderate-income households” or an emergency shelter. (Gov. Code, § 65589.5(d).) A housing development project must have 20 percent of the total units available to lower income households, or all units available for moderate income households, to qualify as housing “for very low, low- or moderate income households.” (Gov. Code, §65589.5(h(3).)

Under subdivision (d), a local agency may deny a qualifying project only if one of following five findings is made:

1. The jurisdiction has met or exceeded its Regional Housing Needs Allocation for the proposed income categories in the development.
2. The housing development or emergency shelter would have a specific adverse impact on public health and safety, and there is no way to mitigate or avoid the impact without making the development unaffordable. The impact must be based on objective, written public health or safety standards in place when the application was deemed complete.
3. The denial or condition is required to meet state or federal law, and there is no feasible method to comply without making the development unaffordable.
4. The project is proposed on land zoned for agriculture or resource preservation that is surrounded on at least two sides by land being used for agriculture or resource preservation, or there are not adequate water or sewage facilities to the serve the project.
5. The project is inconsistent with both the zoning ordinance and the land use designation as specified in any general plan element. **However, a city or county cannot make this finding if it has not adopted a housing element in substantial compliance with state law.** (Gov. Code, § 65589.5(d).)

The finding in Paragraph 5 cannot be made if a City does not have a certified housing element by the deadline established for that jurisdiction by HCD. However, the HAA explicitly states that nothing in the statute limits a jurisdiction's obligation to comply with CEQA. (Gov. Code, § 65589.5(e).)

In addition, notwithstanding the BR provisions of HAA, local agencies may apply "objective, quantifiable, written development standards" that allow for development "appropriate to, and consistent with, meeting the jurisdiction's share of the regional housing need." (Gov. Code, § 65589.5(f)(1).) The development standards must be applied "to facilitate and accommodate development at the density permitted on the site and proposed by the development." (*Ibid.*)

Rights under the BR provision of HAA are terminated when HCD makes a finding that a housing element substantially complies with state law, and in some cases, the jurisdiction completes the rezoning required to implement the housing element amendments. For Cupertino, the deadline for adoption of a compliant housing element was January 31, 2023, the same as that for the 109 jurisdictions in the Association of Bay Area Governments (ABAG). Cupertino's housing element was adopted by the City Council on May 14, 2024, and the adopted housing element and ordinances related to rezoning Priority Housing Element sites were submitted to

HCD on July 11, 2024 for their final compliance review. It is uncertain when HCD will issue a letter to determine compliance with state law. Reports from other jurisdictions indicate a turnaround time of 12 days to 60 days from submittal.

SB330 Housing Crisis Act

Senate Bill 330 (SB330), signed on October 9, 2019, established the Housing Crisis Act of 2019 (“HCA”), which went into effect on January 1, 2020. On September 16, 2021, Senate Bill 8 (SB 8), which updated SB330, made clarifications to the existing regulations and extended the HCA from January 1, 2025 to January 1, 2030, was signed into law. These laws were passed to address the current “housing crisis” in the State with three general aims: 1) increase residential unit development; 2) protect existing housing inventory; and, 3) expedite permit processing. Both SB 330 and SB 8 made numerous changes to the existing legislation, such as the Permit Streamlining Act (“PSA”) and the HAA.

Among the many changes made, the HCA establishes a requirement for cities to implement a preliminary application process for eligible housing development projects. This application process is not required for all housing development projects, but it is required for applicants with eligible projects that seek the vesting and processing benefits offered under SB330. Local agencies are required to compile a checklist for required application materials and an application form for preliminary applications choosing to utilize the vesting rights offered by SB330. (Gov. Code, § 65941.1(b).) The intent of this process is to make the development review process faster and provide certainty to an applicant by **locking in the development requirements, standards, and fees at the time a complete application is submitted for a period of 180 days**. By doing so, the City is prohibited from applying new ordinances, policies and standards to a development with a complete preliminary application, provided the other requirements of SB330 are met. In addition, the local government is not required to provide a formal determination about whether the preliminary application is “complete,” rather the preliminary application is considered “deemed complete.” An application must be “deemed complete,” if it contains all of the information required by Gov. Code §65941.1.

There are certain conditions under which an applicant may lose the vested rights offered under SB330. These include:

1. Failure to submit a complete formal application within 180 days of submittal of an SB330 Preliminary Application;
2. A change in the number of units or square footage of construction changes by 20% after submittal of an SB330 Preliminary Application; or

3. Failure to commence construction 2.5 years from the date of final approval of the project.

It should be noted that the City only needs to accept the submittal of an SB330 Preliminary Application. Until a Formal Application for permits from the City is made, the City is not obligated to process the application. Once a Formal Application for permits is made, the City must process the application pursuant to applicable state and local laws (e.g. Municipal Code, HAA, Density Bonus, and/or other laws).

Relationship between BR and SB330

While the BR provision of HAA has been in legislation since the 1980's, it has received renewed attention and use due to HCD comments regarding a recently proposed project in Santa Monica interpreting the relationship between the BR provision of HAA and SB 330 (first adopted in 2019). HCD opined that **an SB 330 preliminary application submitted prior to certification of a housing element vests development rights as they exist at the time of the application**. Under this interpretation, sans a certified housing element at the time of application of an SB330 Preliminary Application, the City does not have the ability to deny a project due to inconsistency with "both the zoning ordinance and the land use designation as specified in any general plan element." As a result, no development standards in the General Plan or Zoning Ordinance, including density limits, height and setback standards, apply to the vested project and any housing development that meets the criteria of the provisions of the BR provision could be eligible for consideration under the HAA.

On its face, the BR provision of HAA could allow applicants to avoid compliance with local development standards for qualifying projects. However, to date no BR project has been approved in the state. Several factors may limit its uptake in practice. First, the absence of a certified general plan EIR could make CEQA compliance for BR projects time-consuming and expensive, since options for CEQA streamlining may be limited. Second, BR projects require relatively high levels of affordability— 20% of the **total units** must be affordable to lower income households at rents equal to, or less than, 60% of Area Median Income (AMI). By comparison, the Density Bonus Law (applicable when five or more units are proposed) allows a 50% density bonus, if 15% of the **base project units** are affordable to very low income households, those at or below 50% of AMI. It is unclear how many projects would be feasible at the required affordability level. Finally, there are other avenues for development involving a greater degree of streamlining, lower affordability requirements, and much less legal uncertainty. Depending on the location of a parcel

within the City, new state laws may offer other options for redevelopment with housing.

20739 Scofield Drive SB330 Preliminary Application

On March 26, 2024, the City received an SB330 Preliminary application (PR-2024-020) for a multi-family development within a single-family residential neighborhood on a 0.32 acre lot with single family (R-1) zoning, located at 20739 Scofield Drive. The proposal is for 23 units which include 18 market rate units and 5 Below Market Rate Units. Since more than 20% of the proposed total units are affordable at lower income levels, the project is eligible to avail itself of the BR provision of the HAA. To date, their submission has been limited to a SB330 Preliminary Application and does not constitute a Formal Application, which would necessitate City review of the project including but not limited to, applicable objective standards and environmental impacts. If the applicant submits a Formal Application within 180 days of submitting the Preliminary Application (September 22, 2024 is the Formal Application deadline), then the zoning, design, subdivision, and fee requirements in effect at the time the Preliminary Application was submitted shall remain in effect for the remainder of the entitlement and permitting process.

Since the City did not have a Housing Element approved by January 31, 2023, the city has been subject to the BR provisions of the HAA. While the BR provisions may require a local agency to approve an eligible housing development project despite its noncompliance with local development standards, for this particular project, the city has not received any communication from the property owner, as well as any indication of a Formal Application being submitted within the 180-day timeline specified in the HCA.

Other SB330 Preliminary Applications received

To date, the City has received eight SB330 Preliminary Applications in addition to the Scofield Drive proposal, of which four are utilizing the BR provisions of HAA. The following is a list of these applications:

Location and Project Description	Status	Builder’s Remedy/ Density Bonus?
1. 20015 Stevens Creek Blvd (Shan Restaurant etc.) – 142 apartments, including 28 affordable units	<ul style="list-style-type: none"> ▪ Formal Application pursuant to SB330 submitted on May 8, 2023. ▪ Project on hold at applicant’s request 	<ul style="list-style-type: none"> ▪ Utilizing BR provisions of HAA for development standards including density.

Location and Project Description	Status	Builder's Remedy/ Density Bonus?
2. 20770, 20830, 20840, & 20850 Stevens Creek Blvd (Pizza Hut/Fontana's/Staples) – 59 townhomes with 12 affordable units	<ul style="list-style-type: none"> ▪ SB330 Preliminary Application submitted on January 29, 2024. ▪ Formal Application filed July 22, 2024. 	<ul style="list-style-type: none"> ▪ General Plan density compliant at time of SB330 Preliminary Application submittal. ▪ Density Bonus waivers and incentives requested.
3. United Furniture site – 55 townhomes, including 11 affordable units	<ul style="list-style-type: none"> ▪ SB330 Preliminary Application submitted on February 14, 2024. ▪ No formal submittal. ▪ 180-day deadline ends on August 14, 2024. 	<ul style="list-style-type: none"> ▪ General Plan density compliant at time of SB330 Preliminary Application submittal. ▪ Density Bonus waivers and incentives requested.
4. Linda Vista (portion of former McDonald Dorsa quarry, APN 356 05 007) – 30 homes, including six affordable units, and a commercial gymnasium	<ul style="list-style-type: none"> ▪ SB330 Preliminary Application submitted on February 20, 2024. ▪ No formal submittal. ▪ 180-day deadline ends on August 18, 2024. 	<ul style="list-style-type: none"> ▪ Utilizing BR provisions of HAA for standards, including density and land use (commercial use proposed on residential property).
5. 20807, 20813, 20823, and 20883 Stevens Creek Boulevard (Stevens Creek Office Center/Panera Bread) – 139 units, including 28 affordable units, mix of single family, condos and townhomes	<ul style="list-style-type: none"> ▪ SB330 Preliminary Application filed on April 1, 2024. ▪ No formal submittal. ▪ 180-day deadline ends on September 28, 2024. 	<ul style="list-style-type: none"> ▪ General Plan density compliant at time of SB330 Preliminary Application submittal. ▪ Density Bonus waivers and incentives have been requested.
6. 21911 Dolores Ave - 5 townhomes, including 1 affordable unit	<ul style="list-style-type: none"> ▪ SB330 Preliminary Application submitted on April 15, 2024. ▪ No formal submittal. ▪ 180-day deadline ends on October 15, 2024. 	<ul style="list-style-type: none"> ▪ Utilizing BR provisions of HAA for standards including density.

Location and Project Description	Status	Builder's Remedy/ Density Bonus?
7. 20085 Stevens Creek Blvd (Office buildings) - 55 townhomes, including 11 affordable units	<ul style="list-style-type: none"> ▪ SB330 Preliminary Application submitted on June 27, 2024. ▪ No formal submittal. ▪ 180-day deadline ends on December 27, 2024. 	<ul style="list-style-type: none"> ▪ General Plan density compliant at time of SB330 Preliminary Application submittal. ▪ Density Bonus waivers and incentives requested.
8. 11841 Upland Way - 6 homes, including two affordable units	<ul style="list-style-type: none"> ▪ SB330 Preliminary Application submitted on July 15, 2024. ▪ No formal submittal. ▪ 180-day deadline ends on January 11, 2025. 	<ul style="list-style-type: none"> ▪ Utilizes BR provisions of HAA for standards, including density.

As, and when, Formal Applications are submitted for each of these Preliminary Applications, the City's website will be updated with project information, status and procedural requirements.