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TO: **Cupertino City Council**

FROM: **Chris Jensen, City Attorney**

DATE: **September 23, 2024**

SUBJECT: **Downzoning Residential Parcels**

Question Presented

Could the City Council adopt zoning ordinance or general plan amendments to downzone a residential parcel in the City in order to limit the density of a proposed housing development project?

Short Answer

Senate Bill 330 limits local jurisdictions' ability to downzone residential parcels, subject to certain exceptions outlined below. Moreover, even if those exceptions apply, Senate Bill 330 and state housing element law may create legal and practical obstacles to rezoning a parcel to limit the density of a proposed housing development project.

Discussion

Senate Bill (SB) 330 (2019) limits the ability of most cities and counties in the state (including the City of Cupertino) to downzone residentially zoned properties. Under SB 330, those "affected" jurisdictions are generally prohibited from adopting new zoning or general plan standards that would result in a "less intensive use" of a parcel where housing is an allowable use. (Gov. Code, § 66300(b)(1).) This restriction precludes the adoption of measures that would result in reductions to height, density, or floor area ratio, new or increased open space or lot size requirements, or new or increased setback requirements, minimum frontage requirements, or maximum lot coverage limitations.

(*Id.*; *Yes in My Back Yard v. City of Culver City* (2023) 96 Cal.App.5th 1103 [ordinance reducing maximum floor area ratio in single-family residential district violates SB 330].)

SB 330 includes several exceptions to this general rule, including an exception that permits an affected jurisdiction to change the land use designation or zoning of parcels to a less intensive use if the jurisdiction "concurrently changes the development standards, policies, and conditions applicable to other parcels within the jurisdiction to ensure that there is no net loss in residential capacity." ((Gov. Code, § 66300(i)(1).) In addition, SB 330 sets the baseline for "intensity" of land use based on the zoning and general plan designation in place on January 1, 2018, which could potentially allow for the downzoning of recently upzoned parcels. (*Id.*, § 66300(b)(1).)

Despite these exceptions, there remain practical constraints to downzoning residentially zoned parcels, particularly if the rezoning is motivated by reducing the density of a specific proposed housing development project. First, another provision of SB 330 allows a developer to lock in existing development standards by submitting a "preliminary application" that contains specific information defined by state law. (Gov. Code, § 65941.1(a).) A developer that submits a preliminary application before a rezoning or general plan amendment process is completed is generally not subject to any newly adopted development standards, even if the new standards comply with one of the exceptions to SB 330's anti-downzoning provision. (Gov. Code, §§ 65589.5(j), 65589.5(o); see also *Save Lafayette v. City of Lafayette* (2022) 85 Cal.App.5th 842, 850; *California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 844.)

Second, downzoning of any property identified as suitable for housing development in the jurisdiction's housing element would require a housing element amendment, and would be subject to state Department of Housing and Community Development (HCD) review. HCD review would include an evaluation of the impact of the rezoning on the jurisdiction's inventory of suitable sites, as well as compliance with other housing element requirements (*e.g.*, affirmatively furthering fair housing).

Finally, any move to downzone a residentially zoned site has the potential to trigger scrutiny from pro-housing groups or from HCD, which has authority to bring enforcement actions to enforce state housing element law and the Housing Accountability Act, among other state statutes. Local legislation seeking to block housing development projects, particularly projects on housing element sites, could be subject to HCD scrutiny, as well as other potential legal challenges. The City would be at risk of being found liable for the challenger's attorneys' fees, if it is unsuccessful in defending such an action, as well as other remedies under the Housing Accountability Act. (See,

e.g., *Yes in My Back Yard v. City of Culver City*, *supra*, 96 Cal.App.5th at pp. 1121–1122 [attorneys' fees awarded to petitioner in challenge to illegal downzoning]; (Gov. Code, § 65589.5(k).)