

September 17, 2021

Matthew Francois  
Rutan & Tucker, LLP  
455 Market Street, Suite 1870  
San Francisco, CA 94105

Via E-mail: [mfrancois@rutan.com](mailto:mfrancois@rutan.com)

**Re: Application for Zoning Administrator Interpretation  
282 East Middlefield Road  
PL-2021-042 and PL-2021-043**

Dear Mr. Francois:

In accordance with Mountain View City Code ("MVCC") section 36.58.35, I am writing to respond to your request for a Zoning Administrator interpretation of MVCC sections 36.48.70(d) and (g) and sections 36.48.75(c) and (j). You also requested an interpretation from the Zoning Administrator regarding the applicability of these provisions to your client's project, which proposes to develop a 91-unit residential project ("Project") at 282 E. Middlefield Road (the "Project Site").

In brief, the specific Code provisions you cited mean that projects seeking a density bonus in zones that regulate density using Floor Area Ratio ("FAR") only are entitled to bonus density expressed through an increase of FAR necessary to accommodate the bonus units awarded. However, because FAR defines density in these zones, it cannot be subject to a waiver in such zones that regulate density using FAR. By contrast, in zones that regulate density using Dwelling Units per Acre ("du/ac") projects are entitled to bonus density expressed through an increase in du/ac, and FAR in these zones would be waived to the extent that the applicable FAR would physically preclude development of the project at the density permitted.

The specific provisions you cite in your interpretation request were added to the MVCC by an ordinance adopted on March 9, 2021. The applicant submitted a complete preliminary application for the Project on September 17, 2020. Consistent with the requirements of Government Code sections 65589.5(j) and (o), the Project is subject to the City's ordinances, policies, and standards in effect as of September 17, 2020. In other words, the specific provisions cited above are not applicable to the Project. Regardless, under the version of the density bonus ordinance in place at the time the Project's complete preliminary application was submitted, the result would be equivalent: the Project would be awarded an increase in FAR as its density bonus, but not an additional waiver of applicable FAR standards.

Each of these topics are discussed further below.

## I. Code Provisions Subject to Interpretation

MVCC Chapter 36, Article XVI, Division 8 (the “City Density Bonus Ordinance”) was adopted to implement the State Density Bonus Law, consistent with the requirements of Government Code section 65915(a). The City Density Bonus Ordinance provides benefits to facilitate the development of housing that is affordable to the types of households and qualifying residents identified below. (MVCC § 36.48.66.) The benefits include the ability to construct more residential dwelling units than the maximum residential density permitted by the applicable zoning and general plan designations, along with other modifications of otherwise-applicable development standards under defined processes for incentives/concessions and waivers and automatic parking requirement reductions. (*Id.*)

### A. MVCC sections 36.48.70(d) and (g).

The City Density Bonus Ordinance includes numerous definitions of terms used in its operative provisions. The following definitions are applicable to projects applying for benefits under the City’s density bonus program:

**Development standard.** A site or construction condition other than a maximum control on density, including, but not limited to, a height limitation, a setback requirement, a floor area ratio (except in zones where floor area ratio defines the maximum allowable residential density pursuant to paragraph h. of this section), an on-site open-space requirement or a parking ratio that applies to a residential development pursuant to any ordinance, general plan element, specific plan, charter or other local condition, law, policy, resolution or regulation. (MVMC § 36.48.70(d).)

The defined term “development standard” describes the generally-applicable code provisions that are subject to modification as an incentive/concession or as a waiver under the City Density Bonus Ordinance and the State Density Bonus Law. Under this definition, in zones where density is defined by du/ac, FAR limits are development standards subject to further modification after application of the density bonus based on du/ac. Conversely, in zones where density is defined by FAR, the FAR is increased to accommodate units allowed as a density bonus, but it cannot also be further modified through the incentive/concession or waiver process.

**Maximum allowable residential density.** The maximum allowable residential density applicable to the project under the zoning ordinance and land use element of the general plan, or, if a range of density is permitted, the maximum allowable density of that range. Where the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan, the general plan density shall prevail. For general plan land use and zoning designations with a defined

dwelling units per acre standard, such standard shall define the maximum allowable residential density. For general plan land use and zoning designations without a defined dwelling units per acre standard, or for residential uses that are not "dwelling units" as defined in Sec. 36.60.11, the maximum floor area ratio shall define the maximum allowable residential density. (MVCC § 36.48.70(g).)

The defined term "maximum allowable residential density" defines the base density that is applicable to a given project and is subject to automatic increases for qualify projects that provide specified amount of affordable housing or other special housing types. As noted above, the maximum allowable density increases either du/ac (in zones where du/ac limits density) or FAR (in zones where FAR limits density).

B. *MVCC sections 36.48.75(c) and (j).*

The City Density Bonus Ordinance includes multiple provisions to all projects that qualify for a density bonus. The following provisions are the subject of this interpretation:

**No legislative act, discretionary approval or study.** In and of itself, the granting of a density bonus or incentive/concession shall not require a general plan amendment, zoning change, study or other discretionary approval; however, as used in this section, "study" does not include reasonable documentation necessary to establish a housing development's eligibility for a density bonus, incentives/concessions, waivers or parking reductions required pursuant to Sec. 36.48.90. (MVCC § 36.48.75(c).)

This provision means that an applicant need not seek City approval for changes to the General Plan or zoning code if modifications to applicable development standards are consistent with the City Density Bonus Ordinance. Of course, if modifications exceed what is permitted under the City Density Bonus Ordinance, this provision would not be applicable.

**Calculation of base units.** Base density will be calculated as follows:

1. Where dwelling units per acre is the density standard, the base units equal the maximum allowable residential density or the project units, whichever is smaller.
2. Where floor area ratio is the density standard, the base units are proportional to the number of project units and maximum allowable residential floor area, with the same ratio of project units to residential floor area, calculated as follows:

$$\text{Base Units} = \text{Project Units} * \frac{\text{Maximum Allowable Gross Floor Area} - \text{Project Nonresidential Gross Floor Area}}{\text{Project Gross Floor Area} - \text{Project Nonresidential Gross Floor Area}}$$

(MVCC § 36.48.75(j).)

This provision describes the process that the City uses to calculate base density in both zones that regulate density using du/ac and zones that do so using FAR. Prior to adoption of the most recent City Density Bonus Ordinance, the City simply calculated base density in zones that regulate density using FAR; however, the State Density Bonus Law awards density bonuses based on units, so the City Density Bonus Ordinance now uses a formula to convert FAR to units to more closely align with state requirements. As a practical matter, the two approaches lead to the same result, with minor variations due to rounding (the current ordinance can result in a slightly larger project, depending on the size of the units an applicant proposes to build). An excerpt from the City’s Density Bonus Program Guidelines illustrating how the City calculates the base density in zones that rely on FAR is included as Attachment A.

## II. Facts Giving Rise to Interpretation

The General Plan’s Land Use Element designates the Project Site with the East Whisman Mixed-Use land use designation, which defines the maximum allowable density as 1.0 FAR. Likewise, the East Whisman Precise Plan defines the Project Site’s maximum allowable density as 1.0 FAR.

The Project proposes 91 units on the Project Site, 11 of which would be reserved for very low income (VLI) households. By providing on-site affordable housing, the Project would qualify for a density bonus and other benefits. The Project proposes a 2.46 FAR, which exceeds the maximum density, even assuming the largest possible density bonus (an increase of 50% above the maximum allowable density for project that are not 100% affordable). However, the applicant asserts that the State Density Bonus Law requires the City to waive its density standard to allow the 2.46 FAR, which would represent an increase of 146% above the maximum allowable density.

## III. Interpretation

The Zoning Administrator determines that based on the maximum allowable density applicable to the Project Site under the General Plan and the Precise Plan (1.0 FAR), the Project would be eligible for one density bonus of no more than 50%. State Density Bonus Law does not require the City to waive its density standard to allow the proposed 2.46 FAR. To support a density of 2.46 FAR, the applicant would need to pursue amendments to the General Plan and Precise Plan.

As noted above, the City’s General Plan defines density using FAR in specified areas. Specifically, the General Plan says that, “FAR is also the development standard **used to measure density** and intensity in mixed-use areas,” although DU/ac is used to define

density in residential-only neighborhoods. (Mountain View 2030 General Plan, page 80.)

Accordingly, when awarding a density bonus for a project in a mixed-use zone, the City begins with the maximum allowable residential density applicable to the project, and then it applies the amount of density increase based on the formulas provided in the State Density Bonus Law and the City Density Bonus Ordinance, as summarized above.

Under the applicant's preferred interpretation, the Project would improperly be awarded multiple density bonuses. Under the plain language in state law and the City Density Bonus Ordinance, an applicant is not permitted to receive multiple density bonuses; rather, the City is required to grant *one* density bonus and may grant multiple concessions/incentives and unlimited waivers. As explained above, a project's bonus density may be an increase over FAR when FAR is used in the General Plan to define the maximum allowable residential density. By definition, awarding a density bonus based on FAR would mean that an applicant could not receive a second increase in FAR by applying for a concession or a waiver, because this would result in more than one density bonus, contrary to state law requirements and the City Density Bonus Ordinance.

Finally, the Zoning Administrator determines that the Project is subject to the provisions of the City Density Bonus Ordinance as it existed on September 17, 2020, when the Project's complete preliminary application was submitted. However, this does not change the result of the interpretation presented above. Over the past five years, the City has received applications for – and approved – six projects seeking a density bonus in zones that regulate density using FAR only, resulting in 261 bonus units in addition to the maximum allowable residential density. Attachment A includes a table summarizing these approvals. In each of these cases, Projects were awarded a density bonus based on an increase in FAR under the provisions of the previous City Density Bonus Ordinance. Likewise, the Project can qualify for a density bonus that increases FAR by providing the requisite amount of affordable housing or other specified special housing types.

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As provided in MVCC section 36.58.50, you may appeal this determination to the City Council within ten days after the mailing of this determination by following the procedures set forth in MVCC section 36.56.50. To the extent you have questions or would like any additional information in the meantime, please do not hesitate to contact me at [stephanie.williams@mountainview.gov](mailto:stephanie.williams@mountainview.gov).

Sincerely,

Stephanie Williams  
Planning Manager/Zoning Administrator

Attachments

- A. Example Density Bonus Calculations
- B. Recently Approved Density Bonus Projects

cc: City Council

Environmental Planning Commission

Kimbra McCarthy, City Manager

Aarti Shrivastava, Assistant City Manager and Community Development Director

Krishan Chopra, City Attorney

Heather Glaser, City Clerk

## ATTACHMENT A

### Example Density Bonus Calculations

The text below provides examples of how the City calculates base density and awards density bonuses in zones where FAR regulates the density. Further discussion is provided in the City's Density Bonus Program Guidelines, from which these examples are drawn.

#### Example 1

An applicant proposes a 64-unit project in a 105,000 square foot building on a 45,000 square foot lot (2.33 FAR). The maximum FAR is 1.85, allowing 83,250 square feet.

$$\text{Base Units} = 64 * (83,250/105,000) = 50.74, \text{ which is rounded up to } 51$$

If the applicant proposes four very low-income units, the applicant would qualify for the bonus.

- Four very low-income units is greater than 7% but less than 8% of 51 base units, so a 25% bonus is allowed.
- A 25% bonus over 51 base units equals  $63.75 = > 64$ , which is greater than or equal to the project units.
- NOTE: The project floor area is more than 25% over the maximum allowed gross floor area, but only to the extent that the base and allowed units were rounded up. This is consistent with the State Density Bonus Law, which requires each step in the calculation to be rounded up in order to provide the most housing development potential.

If the applicant only proposes three very low-income units, the applicant would not qualify for the requested bonus.

- Three very low-income units is greater than 5% but less than 6% of 51 base units, so only a 20% bonus would be allowed.
- A 20% bonus over 51 base units equals  $61.2 =>$  a maximum of 62, which is less than the project units.

#### Example 2

An applicant proposes a 100-unit project in a 125,000 square foot building on a 50,000 square foot lot (2.5 FAR). The project includes 5,000 square feet of retail. The maximum FAR is 1.0, allowing 50,000 square feet.

$$\text{Base Units} = 100 * (50,000-5,000)/(125,000-5,000) = 37.5 => 38$$

The applicant's requested bonus is calculated as follows:

$$\text{Requested Bonus} = (99.001 - 38) / 38 = 1.6053 = 160.53\%$$

Since the project needs a minimum 160.53% bonus, there is no density bonus available through the State Density Bonus Law for this project, and it cannot be approved.

**ATTACHMENT B**  
**Recently Approved Density Bonus Projects**

The table below summarizes the six applications for projects in zones defining density by FAR that the City has received in the past five years. Each of the projects was approved pursuant to the version of the City Density Bonus Ordinance that was in effect as of September 17, 2020.

| <b>Density Bonus Projects Relying on FAR Approved 2016 - 2021</b> |                      |  |   |                                      |
|---|----------------------|--|---|--------------------------------------|
| <b>Project Address</b>  | <b>Approval Date</b> | <b>Number of Units Proposed under Base Density</b> | <b>Number of Density Bonus Units Proposed</b> | <b>Number of Total Project Units</b> |
| 1701 W El Camino Real   | 6/21/2016            | 54   | 13  | 67                                   |
| 400 San Antonio Road  | 9/27/2016            | 432  | 151   | 583                                  |
| 2700 El Camino Real   | 6/27/2017            | 172  | 39  | 211                                  |
| 1313 El Camino Real   | 12/12/2018           | 18   | 6   | 24                                   |
| 950 W El Camino Real  | 4/30/2019            | 68   | 3   | 71                                   |
| 1100 La Avenida   | 7/2/2021             | 51   | 49**  | 100                                  |
| <b>Total</b>  |                      | <b>795</b>   | <b>261</b>                                    | <b>1,056</b>                         |

*Note: The 1100 La Avenida project is a 100 percent affordable project, to which the City awarded a density bonus beyond the minimum required by State Density Bonus Law.*